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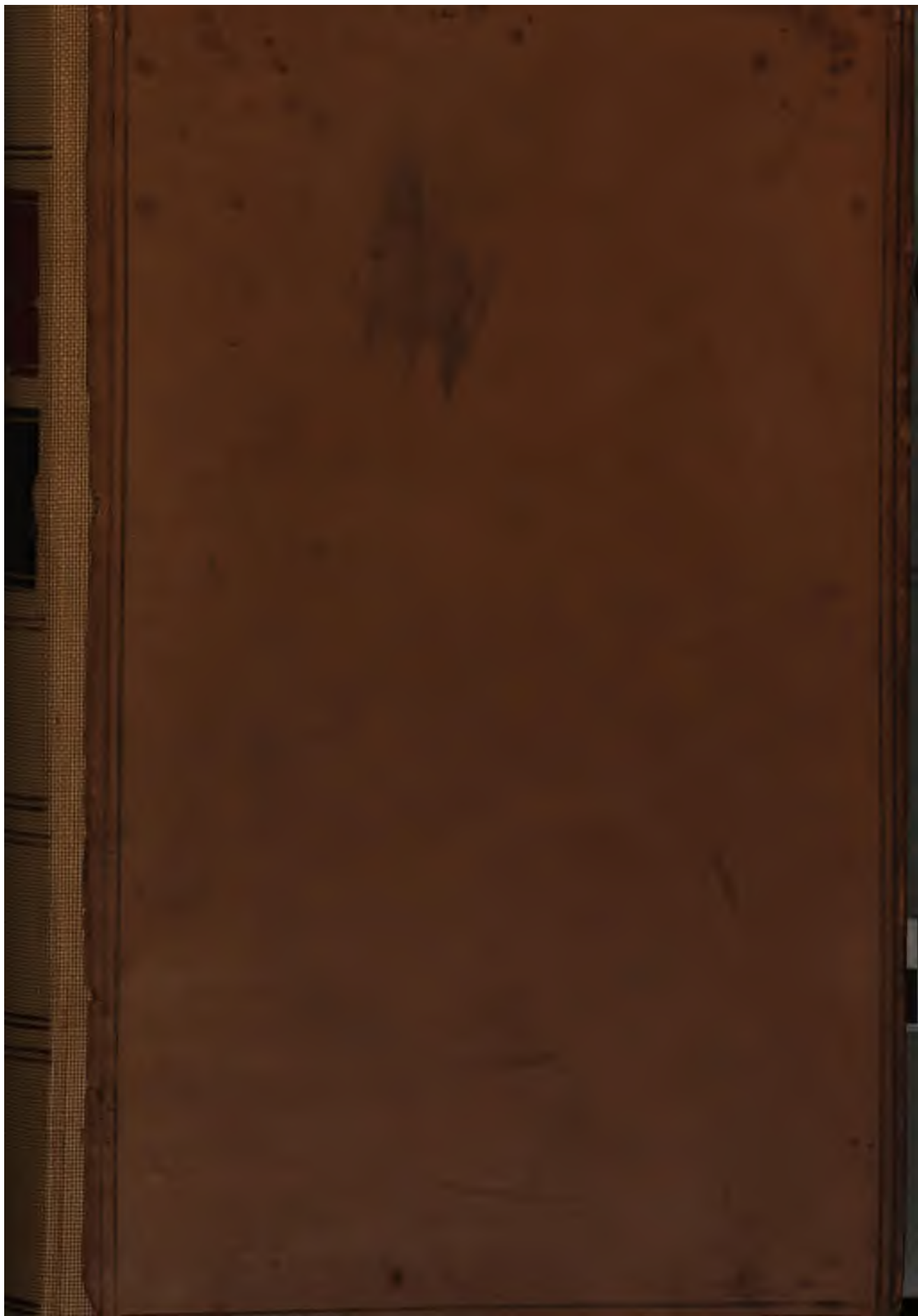
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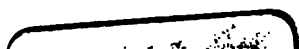
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R E P O R T S
OF
C A S E S
DECIDED IN THE
HIGH COURT OF CHANCERY,
BY
THE RIGHT HON. SIR LANCELOT SHADWELL,
VICE-CHANCELLOR OF ENGLAND.

By NICHOLAS SIMONS,
Of Lincoln's Inn, Esq. Barrister at Law.

VOL. XV.

CONTAINING CASES IN 1845, 1846, & 1847,
WITH A FEW IN 1848.



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ERRATUM.

In Page 192, first line of the Judgment, for "overruled" read "allowed."

CASES IN CHANCERY,

BEFORE THE

VICE-CHANCELLOR.

WATSON v. ENGLAND.

1845.

JOHN WATSON, in contemplation of his marriage, executed a bond for securing the payment of 1500*l.*, by his heirs, executors or administrators, to the obligees in trust for his intended wife, in the event of his dying in her lifetime, and also for securing the payment, by him, of the same sum, to such person or persons as she should, by will, appoint in the event, which happened, of her dying in his lifetime.

8th and 9th
July.

"*Surviving.*"
Will.
Construction.

Mrs. *Watson*, by her will, gave the interest of the 1500 *l.*, to her husband in case he should survive her: "And, after his decease, I order that the said sum of

A married woman having power to dispose of 1500 *l.* by her will, gave the interest of it to her husband for his life, and directed that, after his decease, the principal should be divided,

equally, between the five daughters of her sister, *B.*: and, if any of them should die during her husband's lifetime leaving issue, that the respective issue of such deceased daughters should have equally divided among them their mother's share: but in case any of them should die during her husband's lifetime without lawful issue, that the 1500 *l.* should be divided, share and share alike, among *the surviving said daughters.*

Held that the word "*surviving*" had reference to the testatrix's husband, and, therefore, as all the daughters died in his lifetime and only one of them left issue, that four-fifths of the 1500 *l.* were undisposed of.

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B

1845.

WATSON

v.

ENGLAND.

1500 *l.* shall be divided equally among the five daughters of my late sister, *Bilton*. If any of the said daughters should die during my husband's lifetime leaving lawful issue, then my will is that the respective issue of such deceased daughters, shall have equally divided among them their mother's share : but in case any of the said daughters of my sister *Bilton*, should die during my husband's lifetime without lawful issue, that then the said sum of 1500 *l.* shall be divided, share and share alike, among *the surviving* said daughters. I also give, after my husband's decease, to the said daughters of my sister *Bilton*, to be equally divided among them, share and share alike, the following articles of plate, namely, one silver teapot, three silver sugar-basons," &c. &c.

The testatrix's sister *Bilton* had five daughters living at the date of the will ; three of them died before the testatrix without issue, and the other two died in her husband's lifetime, one of them, whose name was *Margaret*, in 1834, without issue, and the other, whose name was *Sarah Snowball*, in 1821, leaving issue a son, the Defendant *John Snowball*, who administered to his mother, and also to his aunt *Margaret*.

John Watson, the testatrix's husband, died in 1841 ; and, in 1842, his personal representative filed the bill in this cause, stating that he had been advised that only one-fifth of the money due on the bond had become payable, and that the defendant, *John Snowball*, was entitled to that fifth, and praying that the rights and interests of the parties interested in the principal and interest due on the bond, might be ascertained and declared.

CASES IN CHANCERY.

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Mr. *Bethell* and Mr. *Hubback*, for the Plaintiff, said that the words, "the surviving said daughters," meant the daughters of Mrs. *Bilton* who should survive the husband of the testatrix, and that, if all of them had died in his lifetime without issue, there would have been an intestacy as to the whole of the 1500 *l.*; but, as one of them, Mrs. *Snowball*, had left issue, and as the will gave the share of a daughter dying in the husband's lifetime and leaving issue, to her issue, there was an intestacy as to the whole, except Mrs. *Snowball's* fifth, which *John Snowball* was entitled to, in his own right, by way of substitution for his mother, or, in other words, that if all the daughters had survived the testatrix, each of them would have taken a vested interest in one-fifth of the 1500 *l.*, subject to be divested on her dying in the lifetime of the testatrix's husband, and, if she left issue, her fifth would vest in her issue, but, if she left no issue, it would go to such of her sisters as survived the testatrix's husband, and, if they all died in his lifetime, it would become undisposed of: *Taylor v. Beverley*(a).

1845.
WATSON
v.
ENGLAND.

Mr. *Wakefield* and Mr. *Cankrien*, for *John Snowball*, said that Mrs. *Snowball* and her sister, *Margaret*, were, "the surviving said daughters" of Mrs. *Bilton*, and that, as such, they became entitled to the whole of the 1500 *l.* in equal shares; that the share of Mrs. *Snowball* was divested in favour of her issue; but there was nothing, in the will, to divest her sister's share, and, consequently, that *John Snowball* was entitled to one-half in his own right, as being the son and only issue of Mrs. *Snowball*, and to the other half as the representative of her sister.

(a) 1 Coll. 108.

1845.

WATSON

v.

ENGLAND.

Jarvis v. Pond (a); *Lejeune v. Lejeune* (b); *Crowder v. Stone* (c); *Eyre v. Marsden* (d).

At the conclusion of the argument for the Defendant,

The *Vice-Chancellor*, addressing Mr. *Bethell*, said:

The 1500 *l.* is directed to be divided, in the first instance, between the five daughters of the testatrix's late sister, *Bilton*. Then the testatrix says: "If any of the said daughters should die during my husband's lifetime leaving lawful issue, then my will is that the respective issue of such deceased daughters, shall have equally divided among them their mother's share: but, if any of the said daughters of my sister *Bilton* should die during my husband's lifetime without lawful issue, that then the said sum of 1500 *l.* shall be divided, share and share alike, among the surviving said daughters." Now, the order in which those two clauses are placed with respect to each other, is immaterial. They will have the same effect whether the second precedes or follows the first. Therefore the issue of a daughter dying in the lifetime of the testatrix's husband, would take all that the daughter might, eventually, become entitled to. And it is very remarkable that there is nothing in the expression: "my surviving said daughters," which shews that the testatrix, by the word 'surviving,' must necessarily have meant surviving her husband. If that be so, there was no gift over when *Margaret* died without issue; for there was then no surviving daughter: and, consequently, *John Snowball* will take one half of the fund as standing in the place

(a) *Ante*, Vol. 9, page 549.

(b) 2 Keen, 701.

(c) Russ. 217.

(d) 2 Keen, 564.

CASES IN CHANCERY.

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of his mother, and the other half, as representing *Margaret*.

1845.

WATSON

v.

ENGLAND.

Mr. Bethell:

The word, 'surviving,' is a relative term; and the only event to which it can have reference, is the death of the husband; on the happening of which event, and not before, the money was to become divisible. [*The Vice-Chancellor*.—According to that construction, there is an intestacy as to four-fifths of the fund.] Undoubtedly there is; and that was the testatrix's meaning. [*The Vice-Chancellor*.—It is plain that the testatrix meant that the issue of a daughter, should fully represent the daughter.] The testatrix intended that the issue should represent the daughter to the extent of the daughter's original share, but no further. [*The Vice-Chancellor*.—It struck me, when I first read the will, that the construction which I have adverted to, was the most simple and natural. I will, however, consider the case before I finally dispose of it.]

The VICE-CHANCELLOR:

In this case the testatrix contemplated three events: the first was the event of the five daughters of her sister *Bilton* surviving her husband: and she provides for that event by directing that, after the death of her husband, the 1500*l.* shall be divided, equally, amongst the five daughters.

9th July.

Then there were two other contingencies. The daughters might not survive the testatrix's husband; and, if they did not, they might either leave issue or not leave issue: and she provides for those contingencies in the following words: "If any of the said daughters should die during my husband's lifetime leaving lawful issue, then my will is that the respective issue of such

1845.

WATSON
v.
ENGLAND.

deceased daughters, shall have equally divided among them their mother's share; but in case any of the said daughters of my sister *Bilton*, should die during my husband's lifetime, without lawful issue, that then the said sum of 1500*l.* shall be divided, share and share alike, among the surviving said daughters." It is perfectly manifest that the words: "the surviving," have reference only to the event that was pointed out, namely, the event of surviving the husband.

Declare that one-fifth of the principal and interest due on the bond belongs to the Defendant *John Snowball*, and that the remaining four-fifths are undisposed of.

1845 :
5th July and
13th December.

BURNEY v. MACDONALD.

Alien.
Trust.

Testator devised
freeholds and

leaseholds to four persons, *intending* them to hold the same in trust for an alien, and, shortly afterwards, informed *three* of them of his intent; and those three, at his request, wrote letters to him acknowledging the intended trust. After his death, a suit was instituted by two of the devisees against the other two, the alien, the testator's next of kin and the *Attorney-general* as representing the Crown, to have the rights of the parties declared.

The Court refused to make any declaration, except that the lands were not subject to any trust.

Attorney-General—Costs.

In a suit to have the rights of the parties to the property in question declared, to which the *Attorney-general* was a defendant as representing the Crown, the Court refused to give the *Attorney-general* his costs; though it gave all the other parties their costs as between solicitor and client.

CASES IN CHANCERY.

7

3500*l.* bank stock, to his secretary, *Henry Mayer*, whom he mentioned to be a native of *Leghorn* in *Tuscany*, for his life; and he gave to, *C. P. Burney*, *T. Webster*, *W. Macdonald*, and *Charles Thompson*, their heirs, executors, &c. all his freehold and leasehold estates and all other his personal estate, in trust to pay the rents, interest, &c. thereof, to his wife, *Maria Finch*, for life, and, after her decease, if *Mayer* should be then living, in trust to retain the rents of his freehold and leasehold estates to their own use during *Mayer's* life, and to pay the interest of the residue of his personal estate to *Mayer* for life, and, after *Mayer's* death, to dispose of the trust property in the manner therein mentioned.

1845.
BURNLEY
v.
MACDONALD.

The testator, immediately after he had executed his will, told *Webster*, that, although he had given the rents of his freehold and leasehold estates to him and to *Burney*, *Macdonald* and *Thompson*, during *Mayer's* life, yet he did not intend them to retain such rents to their own use, but to pay them to *Mayer*; and that he had made such devise to them, because *Mayer* was a foreigner: and he then requested *Webster* to give him some memorandum or acknowledgment, in writing, of the purpose for which such devise and bequest of his freehold and leasehold estates had been made: and, thereupon, *Webster* wrote to him the following letter: "My dear Sir: I request that you will accept this as an acknowledgment from me that I am aware that your bequest, in your will dated this day, of the rents and profits of your freehold and leasehold estates to the trustees of your will during the life of Mr. *Henry Mayer*, was not intended, by you, for their own use and benefit although so expressed, but in order that they might be

1845.

BURNEY

v.

MACDONALD.

legally enabled to pay the same to the said *Henry Mayer* during his life. I am, &c. *T. Webster*."

The testator, two days after the date of his will, made a statement and request to *Thompson*, verbally, and to *Burney*, in writing, similar to that which he had made to *Webster*; and thereupon they wrote to him the following letters respectively:—"Dear Sir; You may rely, in the event of your death, on my fulfilling your wishes in paying over the income arising from the property you may leave to me and the other trustees under your will, after the decease of your wife, Mrs. *Maria Finch*, to *Henry Mayer*, esq., during the term of his life. Yours, faithfully, *Charles Thompson*."—"Dear *Finch*; I fully understand your meaning with respect to the property bequeathed by you, in your will, 'to my absolute use and benefit;' and agree, in conjunction with my co-trustees (whose declaration to the same effect you will, of course, procure) to make over the proceeds of such property to Mr. *Henry Mayer* during his lifetime, according to your wish and intention. Yours, *C. P. Burney*."

The above-mentioned letters remained in the testator's possession at his death. He died in September, 1830; and, upon his death, the four devisees entered into and had ever since continued in the possession of his freehold and leasehold estates. His widow died in March, 1839.

In January, 1840, the bill was filed by *Burney* and *Webster*, against *Macdonald*, *Thompson*, and *Mayer*, and against the testator's next of kin, the personal repre-

sentatives of his widow, and the *Attorney-general*. It stated the will and the deaths of the testator and his widow, and that the Plaintiffs were advised that, according to the tenor of the will, they and *Macdonald* and *Thompson*, were entitled to the testator's freehold and leasehold estates: that *Mayer* was an alien: that the testator had made such statements and requests to the Plaintiffs and the Defendant *Thompson*, and that they had given him such acknowledgments as before mentioned: that the Plaintiffs could not discover who was the testator's heir: that it was alleged that, under the circumstances before mentioned, a secret trust was created or intended to be created for *Mayer*, and that, he being an alien, the same either enured to the benefit of the Crown or reverted to the heir and next of kin of the testator, according to the nature of the property: that *Mayer* claimed to be entitled to the income of the testator's personal estate during his life, and that he also claimed some interest in the testator's freehold and leasehold estates, or the rents and profits thereof, during his life; and that the same rents and profits were claimed by the *Attorney-general* on behalf of the Crown, upon the ground that a trust thereof was created for an alien, which enured to the Crown; or else that the *Attorney-general* claimed, on behalf of the Crown, to be entitled to the rents and profits of the freehold estates in consequence of the same having escheated by reason of there being no heir to the testator. The bill prayed that the rights and interests of all persons interested in the testator's freehold, leasehold and personal estates might be declared by the Court, in order that the Plaintiffs (who did not, nor did the Defendant *Thompson*, claim any beneficial interest therein) might be indemnified in disposing thereof.

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The Defendant *Macdonald* did not admit any of the statements in the bill except those that related to the will and the deaths of the testator and his widow. He submitted, to the judgment of the Court, whether, upon the widow's death, *Mayer* became entitled to the income of the testator's personal estate. He denied that the testator made to him any statement or request similar to that alleged to have been made to the Plaintiffs and *Thompson*, or that he made any promise to hold any part of the testator's property, or any interest therein, for *Mayer's* benefit; and he submitted that, as the testator had, by his will, made an express devise of an interest in land, he could not vary, alter or revoke the same otherwise than by a writing duly executed and attested according to the Statute of Frauds. He added that, if the letters stated in the bill, were, in fact, written and sent to the testator by the Plaintiffs and the Defendant *Thompson*, the same being for the void and illegal purpose of giving an alien an interest in land, would prevent any interest in the testator's freehold and leasehold estates from passing to them, and, therefore, he was alone entitled to those estates during *Mayer's* life: that, if *Mayer* was an alien, the will did not purport to give him any estate at law in or control over lands in *Great Britain*, and, therefore, the *Attorney-general* on behalf of the Crown, was not entitled to any interest in the testator's freehold and leasehold estates; and that, the Plaintiffs and the Defendant *Thompson* having waived all claim to those estates, he was entitled to the entirety thereof during *Mayer's* life: that, even if the Court should be of opinion that a trust of any sort had been created as to three-fourth parts of the freehold and leasehold estates, he was entitled to the remaining fourth, for his own absolute use, during *Mayer's* life.

Mayer claimed the income of the testator's personal estate during his life, and such right and interest in the freehold and leasehold estates, as, in the judgment of the Court, he was entitled to.

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The personal representatives of the testator's widow, claimed one-half of the testator's personal estate as undisposed of at his death.

The testator's next of kin claimed all such interest in his estate as the Court should think them entitled to: and the *Attorney-general* claimed, on behalf of the Crown, in the usual, general terms.

Mr. *Teed* and Mr. *Faber* appeared for the Plaintiffs.

Mr. *Stuart*, Mr. *Coote*, and Mr. *Grove*, for the Defendant, *Macdonald*, said that their client was entitled to one-fourth, at the least, of the testator's freehold and leasehold estates.

The *Vice-Chancellor*.—I do not see that there is anything to affect Mr. *Macdonald*.

Mr. *Bethell*, Mr. *Wakefield*, and Mr. *Stinton*, for the testator's next of kin and the personal representatives of his widow, said: first, that, even if *Mayer* had not been an alien, the letters written by the Plaintiffs and *Thompson*, would have been totally unavailing to create any beneficial interest in his favour, as being contrary to the policy of the law.

Secondly, that the Crown could not take; for the

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legal estate was vested in the four devisees : *Burgess v. Wheate* (a) : and,

Thirdly, that, as three of the devisees declined to take any beneficial interest, there was a resulting trust, as to three-fourths of the rents of the leaseholds, during *Mayer's* life, for the personal representatives of the testator's widow and his next of kin.

Mr. *Lewis*, for *Thompson*, said that, as the legal estate in the freeholds and leaseholds, was vested in the devisees, it was quite clear, from *Burgess v. Wheate*, that the Crown had no claim ; and that, as no trust was expressed, the Court could not hold that the devisees were intended to take otherwise than beneficially ; for it could not look at the letters ; and, consequently, his client was entitled to one-fourth of the rents of the estates, during *Mayer's* life. *Henchman v. The Attorney-general* (b).

The *Vice-Chancellor*.—I cannot look at the letters either as testamentary instruments, or as evidence of the testator's intention. They are extrinsic to the will. They are signed by the devisees, and not by the testator, and express, not his will, but theirs.

Mr. *Twiss* and Mr. *Wray*, for the *Attorney-general*, contended, first, that the devisees could not say, in the face of the declarations of trust which they had signed, that they were entitled to hold the lands for their own benefit ; secondly, that the devise was a contrivance to defeat the rights of the Crown, and was altogether

(a) 1 Eden, 177.

(b) 3 Myl. & Keen, 485.—
The Defendant, for whom

Mr. *Lewis* appeared, did not claim, *by his answer*, any beneficial interest in the estates.

void, as being against public policy ; and, therefore, the Crown was entitled to the freeholds as standing in the place of the testator's heir, who could not be found. They cited *De Hourmelin v. Sheldon* (c); *The Attorney-general v. Sir George Sands* (d); *The Attorney-general v. Duplessis* (e); *Muckleston v. Brown* (f).

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Whereupon Mr. *Bethell* observed that no trust had been declared in favour of the alien ; for the Court had decided that it could not look at the letters by which the trust was said to have been declared ; and that the alien could not come to the Court to have the trust declared, nor could the Crown ; and, if the alien could not take, the Crown could not take. He referred to *Gilbert on Uses*, pp. 86, 87, *Sugden's* edit., where it is laid down that, though a use may be raised to an alien, he cannot compel the feoffees to execute the use ; and that the king cannot seize the land of an alien, unless it be executed in him by a decree in Chancery ; for there is no right in the *cestui que use* to seize the lands without a decree, and the king has only the rights of the *cestui que use*.

The *Vice-Chancellor* :—Supposing that the Crown had a right to come to this Court for the purpose of having it declared that the lands in question were devised in trust for the alien, I do not see how I could make that declaration in this suit ; for the *Attorney-general* is a party to it, not as Informant, but as a Defendant.

Mr. *Lowndes*, Mr. *Lovat*, and Mr. *Nevinson* appeared for other parties.

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| (c) 1 Beav. 79, see 91, and
4 Myl. & Cr. 525. | (e) Parker's Rep. 144, and
1 Bro. P. C. 415, and 2 Vez.
286. |
| (d) Hard. 488, and Freem.
C. C. 129. | (f) 6 Ves. 52, see 69. |

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The VICE-CHANCELLOR :

The bill in this case is filed by two of the four gentlemen to whom the testator devised his freehold and leasehold estates; and the principal question is, whether the Court can make a declaration that, under the circumstances of the case, those four devisees, or rather, three of them, took the estates as trustees for the alien.

I do not think that this Court would do so idle a thing as to hear an alien insist that there was a trust for him, when it would know, at the same time, that he could not have any benefit from it. There would be no violation of any principle of justice in refusing to let him have property which he could not hold. Then, if the alien could not enforce the trust, I do not very well see how the Crown, which must claim through him, can have any right to the property.

I can very well understand that, where the alien is actually in possession, and there is no question about trusteeship, the rule of common law will prevail; and, if it should so happen that an office could not be found, then, for aught I know, there might be a decree upon an information in equity. But that is not this case.

Then this has struck me very forcibly: namely, that we must consider what the transaction between the testator and the three gentlemen who wrote the letters, really was. The will is perfectly clear: but the question is, whether, in a case where the testator meant to have something carried into effect which is beyond the purpose expressed upon the face of his will, there is sufficient to fix a trust, on those three gentlemen, in favour of the alien.

Now it is quite plain that the testator meant to have an effectual trust declared, for the alien, by all the four devisees. But, with respect to Mr. *Macdonald*, there is no trust, nor has there been any attempt, on his part, to declare a trust. Then, is not this the fair construction of the three letters, namely, that the gentlemen who wrote them, wrote them under the impression that all the four would concur in giving effect to the trust. It is manifest, from Dr. *Burney's* letter, that such was the impression on his mind; and it does not appear that any one of the three was aware that the letter which he wrote, would be ineffectual to benefit the alien. Then can it be said that a trust was created by the letters, when it is apparent, on the face of them, that the persons who wrote them were ignorant of their effect? This Court does not hold parties bound by instruments written under such circumstances. There must be reasonable evidence that the parties understood them, and meant to be bound by them in all events. There is no such evidence in this case: and, therefore, I am of opinion that the letters are not papers which this Court is authorized to say are binding on the three gentlemen who signed them. The consequence is that I must leave the property as I find it.

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Declare that the freehold and leasehold estates devised, by the testator, to the Plaintiffs and the Defendants *W. Macdonald* and *Charles Thompson*, are not, during the life of the Defendant *Henry Mayer*, subject to or affected by any trust whatever: order the costs of all parties, *except the Attorney-general*, to be taxed, as between solicitor and client, and paid out of the testator's general personal estate.

The Court refused to give the *Attorney-general* his

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costs, on the ground that it was not the practice so to do except in charity cases: and Mr. *Bethell* said that, in the *Attorney-general v. The Corporation of London* (g), the *Master of the Rolls* refused to give the *Attorney-general* his costs.—See, however, the *Attorney-general v. Lord Ashburnham* (h) where Sir *John Leach*, V. C., said that he found no such general principle, in courts of equity, as that the Crown could neither receive nor pay costs: that the *Attorney-general* constantly received costs, where he was made a defendant, in respect of legacies given to charities, and even *where he was made a defendant in respect of the immediate rights of the Crown* in cases of intestacy.

On the 13th of December, 1845, the minutes of the decree were spoken to; and it was then ordered that the decree should be dated as of that day, and that certain sums of money, arisen from the rents and profits of the freehold and leasehold estates, which the Plaintiff, *Webster*, had paid into Court, should be repaid to him.

(g) 8 Beav. 270.

(h) 1 Sim. & Stu. 394.

WHITE v. BRIGGS.

THE will of *John White*, the testator in this cause, contained the following passages: "I give to my dear wife, if she should survive me, the full and entire use, for her life, of all my property, both real and personal, of every description. After the death of my wife, my nephew *Charles Herbert White*, of the Bengal Cavalry, son of my deceased brother *Charles White*, is to be considered as heir to all my property not otherwise disposed of or allotted; but, having had little intercourse with him, and being apprehensive that his habits require some control, I direct that whatever portion of my property may hereafter be possessed by him, *shall be secured*, by my executors, *for the benefit of his family*. My whole estate, I repeat, is to be possessed and enjoyed by my wife during her natural life. My plate, books, pictures, prints, coins and curiosities of every kind, with the furniture, are to be held as appendages to my house; but consumable articles, viz. linen, china, liquors, carriages, horses, hay-stacks and the like, are allotted, entirely, to my wife's use, and, together with all her jewels, trinkets, clocks, watches and ornaments, may be finally appropriated as she pleases, with the sum of 4000 *l.* in money: this sum, however, I recommend to her to divide as follows: 2000 *l.* to her sister *Mrs. George Wroughton*, 1000 *l.* to *Mrs. George Wetherall*, 1000 *l.* to the children of *Mrs. Podmore*, with further distribution, viz. of the 2000 *l.* to *Mrs. Wroughton*—1000 *l.* to her daughter *Jane*, 500 *l.* to her daughter *Mary*, 500 *l.* to

to be settled on the nephew for life, and on his death.

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15th July.

"Family."
Will.
Construction.

Testator gave all his property, both real and personal, to his wife for life: "and, after the death of my wife, my nephew is to be considered as heir to all my property: but I direct that whatever portion of my property may, hereafter, be possessed by him, shall be secured, by my executors, for the benefit of his family." Held, taking the whole of the will together, that the testator, by the word 'family,' meant the children, but not the wife of his nephew; and that the property ought children after his

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her daughter *Julia*: of the 1000*l.* to Mrs. *Wetherall*, 500*l.* to her daughter *Fanny*, 300*l.* or 100*l.* each to her three sons, 200*l.* to Colonel *Wetherall*, their father: of the 1000*l.* to Mrs. *Podmore's* children, 300*l.* to her daughter *Fanny*, 300*l.* to her daughter *Charlotte*, 100*l.* to her son *Charles*, 100*l.* to her son *Richard*, 200*l.* to Colonel *Podmore*. * * After the decease of my dear wife, my real property, consisting of a house and garden in *Doncaster*, the front field of four acres which I purchased of Mr. *Broadhead*, and the close of seven acres and a half which I purchased of Mrs. *Childers*, I leave to my nephew before mentioned, *and his heirs or family*. My object in purchasing the front field, was to guard against the erection of houses which might have incommoded my own residence: I leave my heirs to exercise their own discretion regarding it. * * * My object in purchasing Mrs. *Childers's* field, was to effect an exchange, with Mr. *Copley*, for a small field adjoining my garden. Mr. *Copley* was an assenting party to this purchase; but, notwithstanding valuations were completed, the negotiation between us was impeded, and, intermediating*, his own power has been interfered with by *an increase in his family*. * * * My debts will be found inconsiderable; and I request my funeral expenses may be as moderate as decency will require. These charges being provided for, my nephew will further have the immediate benefit of my personal property variously situated, *and his heirs or family after him*. I shall annex a schedule of these, but again urge, on my executors, to consider it an indispensable obligation to *secure my estate in the nature of a trusteeship, for the parties who may be interested hereafter.*"

* *Sic.*

On the cause coming on to be heard for further

directions, one question was whether there was any trust in the will which required a settlement to be made of the property to which *Charles Herbert White* was entitled in remainder expectant upon the decease of the testator's widow.

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Mr. *Bethell* and Mr. *Toller* appeared for the Plaintiff, the testator's widow; but, as their client was not interested in the question, they took no part in the argument.

Mr. *Walker* and Mr. *Faber*, for *Charles Herbert White*, the nephew and heir of the testator, contended that no trust which the Court could execute, was created by the will; for neither the objects of it nor the mode in which it was to be carried into execution, were pointed out with sufficient certainty.

Mr. *James Parker* and Mr. *Campbell*, for the wife and the son and daughters of *Charles Herbert White*, said that the subject of the trust was all the property that *C. H. White* took under the will, and that he and his wife and children were the objects of the trust, and that the Court ought to direct the *Master* to approve of a proper settlement in the language which the testator had used.

They cited *Harding v. Glyn* (a), *Blackwell v. Bull* (b), *Macleroth v. Bacon* (c), *Trevor v. Trevor* (d), and *Wood v. Wood* (e).

(a) 1 Atk. 469.

(b) 1 Keen, 176.

(c) 5 Ves. 159.

(d) *Ante*, Vol. 13, page 108.

(e) 3 Hare, 65.

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Mr. *Stuart*, Mr. *Sidebottom*, and Mr. *Briggs* appeared for the other parties.

THE VICE-CHANCELLOR :

The testator, in that part of his will in which he says that the negotiation between him and Mr. *Copley* was impeded by an increase in that gentleman's family, plainly uses the word, "family," in the sense of children. Therefore, I think that, when he speaks of the family of his nephew, he means, not the wife and children, but only the children of his nephew. Then, in other parts of his will, he uses the words, "heirs or family," as synonymous with each other: from which it is to be inferred that he intended his nephew and his children or family to take, not collectively, but in succession. And that such was his intention is made still more plain by the subsequent parts of his will in which he uses the expressions, "and his heirs or family after him," and, "I again urge, on my executors, to consider it an indispensable obligation to secure my estate, in the nature of a trusteeship, for the parties who may be interested hereafter."

I think, therefore, that there is sufficient, in this case, to justify me in referring it to the *Master* to approve of a proper settlement of the testator's property on his nephew and his family.

Declare that, according to the true construction of the will, a valid trust was created for the purpose of having a settlement made of the real estate and the residuary personal estate of the testator, for the benefit of the Defendant *C. Herbert White*, and his family, subject to the life interest of the Plaintiff therein: and refer it to the *Master* to approve of a proper settlement of the

estate and interest of the Defendant *Charles Herbert White*, expectant on the death of the Plaintiff, in the real estate and the residuary personal estate of the testator, for the benefit of the Defendant *Charles Herbert White* and his family, having regard to the directions in that behalf contained in the will.

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On the 18th of June, 1846, the *Master* reported that, as to the settlement directed to be approved of by him by the order of the 15th of July 1845, he had approved of the same by an indenture of settlement, made between the Plaintiff, *Matilda White*, of the first part, the Defendant *Charles Herbert White*, of the second part, the Defendants *Thomas Briggs* and *Robert Baxter*, of the third part, and *Wm. John Bagshawe* and the Rev. *Edward Bagshawe* and the said *Thomas Briggs* of the fourth part; but, inasmuch as it appeared that the opinion of the Court was to be asked for upon the terms of the settlement so approved of, and that, in order thereto, exceptions were to be taken to his report, he had, for the present, forborne to cause the settlement to be engrossed; and the draft thereof then remained, in his office, to await the further directions of the Court.

Charles Herbert White and *Georgiana Jubilee* his wife, excepted to the report; as did also *Charles Howard White*, their only son, and their other children, all of whom were infants.

Mr. and Mrs. *White*'s exception insisted that the draft was not a proper settlement, of the testator's real and residuary personal estate, for the benefit of Mr.

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White and his family, having regard to the directions in the will, because the *Master* had not inserted in it any provision for Mrs. *White*, and had not given Mr. *White* any power of appointment or distribution among his children over any part of the property : Whereas the *Master* ought to have given Mrs. *White* an estate during her life or widowhood, either absolutely or under an appointment to be exercised by her husband, in the whole or in some part of the property, to commence on her husband's death, and ought to have given Mr. *White* a power, to be exercised by him by deed or will, of appointment or distribution among his children, over the whole, or, at all events, over some part of the property.

Charles Howard White, by his exception, insisted that, regard being had to the directions in the will, the settlement approved of by the *Master* was not a proper settlement :

First, because the real estates, instead of being limited, as they were, from and after the decease of *Charles Herbert White*, to his first and other sons, successively, in tail male, with remainder to his daughters as tenants in common in fee, ought to have been limited, from and after that event, to the Exceptant in fee.

Secondly, because the *Master* had inserted, in the draft, powers of leasing and of sale and exchange.

Thirdly, because the testator's plate, books, pictures, prints, coins, curiosities, and furniture, instead of being made to go along with the real estates as far as the law would permit, ought to have been limited, after the decease of the survivor of the Plaintiff and *Charles Herbert White*, to the Exceptant absolutely.

Fourthly, because the residuary personal estate, instead of being limited, after the decease of *Charles Herbert White*, in trust for all his children by his then or any future wife, absolutely, as tenants in common, ought to have been limited, after the decease of the survivor of the Plaintiff and *C. Herbert White*, in trust for the Exceptant absolutely : and,

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Fifthly, because the settlement contained certain powers as to advancement and maintenance, and directions for accumulating the surplus of the income not applied for maintenance : Whereas such powers ought to have been limited in favour of the Exceptant alone ; and all accumulations of income not applied for his maintenance during his minority, ought to have been declared to be in trust for him absolutely.

The daughters of Mr. and Mrs. *White* excepted to the report on the following grounds :

First, because the testator's real estates were limited, after the decease of *Charles Herbert White*, to *Charles Howard White* and every other son of *Charles Herbert White* by his then or any future wife, successively, in tail male, with remainder to all the daughters of *Charles Herbert White*, as tenants in common in fee : Whereas they ought to have been limited, after decease of *Charles Herbert White*, to the use of all his children by his then or any future wife, as tenants in common in tail, with cross-remainders between and among them in tail, with remainder to *Charles Herbert White* in fee, or, otherwise, to all the children of *Charles Herbert White* by his then or any future wife, as tenants in common in fee.

Secondly, because the plate, books, pictures, prints,

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coins, curiosities, and furniture, were assigned to trustees upon trusts corresponding, as nearly as the law would allow, with the limitations of the real estates: Whereas they, or some of them, ought to have been limited, after the death of *Charles Herbert White*, to trustees in trust to sell and divide the proceeds equally amongst all his children, with cross-remainders between them in case of sons dying under twenty-one without leaving issue, and of daughters dying under that age and without having been married, with remainder in trust for *Charles Herbert White* absolutely.

Thirdly, because the stocks, funds and securities in which the residuary personal estate was directed to be invested, were limited, after the death of *Charles Herbert White*, in trust for all his children by his then or any future wife absolutely: Whereas the draft ought to have provided that, in the event of any of his sons dying under twenty-one and without leaving issue, or any of his daughters dying under that age and without having been married, their shares of the trust-funds, as well original as accrued, should go to the surviving children as tenants in common, and that, in the event of all the sons dying under twenty-one and without leaving issue, and all the daughters dying under that age and without having been married, the whole of the said funds should be in trust for *Charles Herbert White* absolutely.

Mr. *Campbell*, in support of the exception taken by *Charles Howard White*:

By the draft approved of by the *Master*, the testator's real estates are limited to *Charles Herbert White* for life, with remainder to his first and other sons, successively, in tail male, with remainder to his daughters as tenants in common in fee: the plate and other articles

which the testator has directed to be held as appendages to his house, are assigned, to trustees, as heir-looms; and the residuary personal estate is limited in trust for *Charles Herbert White* for life, and, after his death, for all his children, absolutely, as tenants in common. *Charles Howard White*, who is the only son of *Charles Herbert White*, insists that the real estates ought to have been limited to him in fee, after the death of his father; and that the appendages and the residuary personal estate ought to have been limited, after the same event, to him absolutely.

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The cases in which the Court has been required to put a construction upon the word, 'family,' decide that the heir is the person designated by that word, whether the subject of the gift is real estate alone, or real and personal estate blended together. *Chapman's case* (*f*), which is approved of in *Couden v. Clerke* (*g*), *Wright v. Athyngs* (*h*), *Doe v. Over* (*i*), *Doe v. Smith* (*k*), *Gwynne v. Muddock* (*l*), *Crossly v. Clare* (*m*), *Pyot v. Pyot* (*n*), *Barnes v. Patch* (*o*). Perhaps it will be said that the trust in this case, is executory: but there is no instance in which this Court has moulded a trust to convey to A. and his family. Besides, the instrument on which the question arises, is a will, not marriage articles; and nothing is said about an estate tail: *Fearne's Cont. Rem.* 113. Nor is there any illegality in the gift, as there was in *Humberston v. Humberston* (*p*). Moreover, the testator first gives *Charles Herbert White* an absolute interest

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| (<i>f</i>) <i>Dyer</i> , 333 a. | (<i>l</i>) 14 <i>Ves.</i> 488. |
| (<i>g</i>) <i>Hob.</i> 29. See 33. | (<i>m</i>) <i>Amb.</i> 397. |
| (<i>h</i>) 17 <i>Ves.</i> 255, and 19 <i>Ves.</i> 299. | (<i>n</i>) 1 <i>Vez.</i> 335. |
| (<i>i</i>) 1 <i>Taunt.</i> 263. | (<i>o</i>) 8 <i>Ves.</i> 604. |
| (<i>k</i>) 5 <i>Mau. & Sel.</i> 126. | (<i>p</i>) 1 <i>P. W.</i> 332. |

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in all his property: then he thinks it right to cut down that gift, and directs that, whatever portion of his property may be possessed by *Charles Herbert White*, shall be secured, by his executors, for the benefit of his family: that is, he desires it to be secured as against *Charles Herbert White*; and, therefore, he reduces the absolute interest which he had before given him, to a life-interest. There is not, however, the slightest indication of intention, on the part of the testator, that his property should be limited in strict settlement.

With respect to the claim, made by the wife of *Charles Herbert White*, to have a provision made for her as part of the family, the cases of *Macleroth v. Bacon* (q), *Wright v. Atkyns* (r), and *Barnes v. Patch* shew that that claim cannot be supported.

Mr. *Walker* and Mr. *Faber*, in support of the exceptions taken by the daughters of Mr. and Mrs. *White*:

The parties for whom we appear, contend that the real estates ought to be settled on all the children of *Charles Herbert White*, either as tenants in common in tail with cross-remainders in tail, or as tenants in common in fee: and that the personal estate ought to be settled on the same persons, absolutely, as tenants in common; and that clauses of survivorship and accruer ought to be introduced into the settlement.

The authorities shew that the meaning of the word, 'family,' must be determined by the context of the instrument in which it is used. It naturally means,

(q) 5 Ves. 159.

(r) Turn. & Russ. 143.

'children ;' and, if there is nothing in the context of the instrument to shew that it was used in a different sense, it must receive that interpretation. In *Macleroth v. Bacon* Lord *Alvanley* says that, where a legacy is given in trust for a *feme covert* and her family, the construction of such a legacy, unaccompanied by any other circumstances, would be that it should be applied for her and her children. *Barnes v. Patch*, *Blackwell v. Bull* (s), *Woods v. Woods* (t), and *Wood v. Wood* (u), are authorities to the same effect. And Lord *Ellenborough*, C. J., says, in *Doe v. Smith*, that the word, 'family' does not always and necessarily mean the eldest male. It is true that, in that case, the judgment of the Court was in favour of the eldest son exclusively; but the question arose upon a devise of real estate alone, and the words: "to go in heirship for ever," were added. In *Chapman's* case also, the subject of the gift was land only; and all that that case decides is that, if the language of the will shows that the head of the family was meant, the eldest son shall take. The case of *Wright v. Athyns* is no authority; for the House of Lords reversed the decisions of Sir *Wm. Grant* and Lord *Eldon* (x). The testator, in this case, uses the words, 'heirs,' and, 'family,' as synonymous terms; and it is clear that he meant a plurality of persons; for, in one part of his will, he says: "I leave my heirs to exercise *their* own discretion;" and, in another part, he directs his executors to secure his estate, in the nature of a trusteeship, for the *parties* who might be interested thereafter.

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As the trust in this case is executory, the Court will

(s) 1 Keen, 176.

(t) 1 Myl. & Cr. 401.

(u) 3 Hare, 65.

(x) The appeal to the House of Lords is not reported.

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direct clauses of survivorship and accruer and all other reasonable provisions to be inserted in the settlement.

Mr. *James Parker* and Mr. *Bagshawe*, in support of the exception taken by Mr. and Mrs. *White* :

The testator intended that a prudent and reasonable settlement should be made of his property; but no settlement on a man and his family, would be reasonable or indeed proper, unless it contained a provision for his wife as well as his children. *Blackwell v. Bull*. In *Wright v. Atkyns* (y), Lord *Eldon* says: "It is contended that the words, 'my family,' must be taken in a popular sense, and that the nature of the disposition shews they are not to be taken in a technical sense. Then, what is the popular sense of those words? * * * Surely it is a singular thing to state that a wife is no part of one's family." In *Barnes v. Patch* the families of the testator's brother and sister were the sole objects of the gift: nothing was given to the brother and sister. But, in this case, the property is to be settled, not only on the family of the testator's nephew, but on *him and* his family. In *Wood v. Wood* there were two distinct gifts, one to *Samuel Wood*, and another to his family; and, therefore, if the Court had held that his wife was included in the term, 'family,' he would, in effect, have taken under both gifts.

Secondly, we submit that it is both reasonable and proper that *Charles Herbert White* should have a power of distribution amongst his children. The testator's object in directing a settlement to be made of his property, was to prevent his nephew from making an im-

(y) Turn. & Russ. 159.

provident alienation of it ; but not to make the children wholly independent of their father.

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The VICE-CHANCELLOR :

Where a question arises about the meaning of a word which may bear many senses, it is right to refer to old cases, to see the received construction of such a word. But, if the instrument contains words not technical, and a question arises about the meaning of them, the first duty of the Court is to see whether the instrument itself does not furnish an interpretation of them. Having made those remarks, I will go through the will.

The testator says: "I give to my dear wife (if she should survive me) the full and entire use, for her life, of all my property of every description, both real and personal: after the death of my wife, my nephew *Charles Herbert White*, (whom he describes), is to be considered heir to all my property not otherwise disposed of or allotted; but, having had little intercourse with him, and being apprehensive that his habits require some control, I direct that whatever portion of my property may hereafter be possessed by him, shall be secured, by my executors, for the benefit of his family." That necessarily conveys the notion that the nephew was to be tenant for life of everything after the death of the testator's wife; and that, after his death, the property should be secured for the benefit of his family. Then the testator introduces a clause relating to his plate, prints, and pictures, which he says shall go as appendages to his house, that is, that they should be treated as heirlooms in the common way. Then he says: "after the decease of my dear wife, my real property, consisting of

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a house, &c. &c., I leave to my nephew before mentioned and to his heirs or family:" and there the testator uses the terms, "heirs," and, "family," as synonymous with each other. The one is, evidently, a mere substitution for the other.

Then he says: "My object in purchasing the front field, was to guard against the erection of houses which might have incommoded my own residence. I leave my heirs to use their own discretion regarding it." Now he had before called his nephew his heir; and, in a former sentence, just before the one which I have last read, he has left the house, &c., to his nephew and his heirs or family; and here he says, "I leave my heirs to use their own discretion regarding it;" therefore, I apprehend, he means to speak of his nephew and his family, collectively, as a body. Then he alludes to an exchange which was intended to be made between him and Mr. *Copley*: after which we find this remarkable expression: "his own," that is, Mr. *Copley's*, "power, has been interfered with by an increase in his family." Now those words, in common parlance, mean the addition of a child. Therefore, I think that the testator, when he uses the word, "family," means, "children."

And it is pretty evident that, when the testator speaks of, "heirs or family," he means persons all bearing the same sort of character to each other, and not persons who might stand in the relation of children to a mother, or in the relation of children to a step-mother: because it might happen that there might be a wife the mother of children, and that she died, and her husband married a second time, and that the step-mother survived and

had no children. It is impossible to read the will without seeing that the testator was speaking of persons bearing the same character amongst themselves, as the persons who were to succeed his nephew.

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Then, after speaking about his funeral expenses, he says: "These charges being provided for, my nephew will further have the immediate benefit of my personal property variously situated, and his heirs or family after him." There, there is a repetition of the same idea, and the same phrase as before is used, except that the expression, "after him," is added; which evidently shews that the heirs or family were to take after the death of the nephew.

Then he says: "I shall annex a schedule of these; but again urge upon my executors to consider it an indispensable obligation to secure my estate, in the nature of a trusteeship, for the parties who may be interested hereafter." Therefore, it seems to me to be evident that the testator intended that his nephew should not take absolutely so as to deprive his children of taking, but that those who stood in the relation of children to him, should take after him. I mention that because it appears to me that, in case there should be a failure of children, it would be a very reasonable thing to give the estate back to the nephew; inasmuch as he is deprived of it only for the sake of his children.

I think also that there is no necessity for violating the intention of the testator, or extending it beyond what we find upon the face of the will; and, as he has spoken of those who are to take in remainder, collectively, or, as we should say, as joint-tenants, I see no reason why the property should not be limited to the nephew for life,

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with remainder to the children, and, in case there should be no child at his death, then to the nephew absolutely.

With respect to the plate and the other articles which are directed to be held as appendages to the testator's house, my opinion is that they must go as heir-looms.

“ Declare that, according to the true construction of the will of *John White*, the testator in the pleadings named, the real estate of the said testator ought to be vested in trustees, to the use of the Plaintiff, the testator's widow, and her assigns, for her life without impeachment of waste, with remainder in trust for the Defendant *Charles Herbert White* for life, without impeachment of waste, with remainder in trust for all and every the children and child of the said Defendant *Charles Herbert White*, born or to be born, as joint-tenants in fee, but subject to the proviso hereinafter mentioned; and that, from and after the decease of the said Plaintiff, the residuary personal estate of the said testator, except the heir-looms, ought to be transferred by the executors and vested in trustees, upon trust to pay the interest, dividends and annual proceeds thereof to the Defendant *Charles Herbert White* for his life, and, after his decease, upon trust, as to the *corpus*, for the child or children of the said *Charles Herbert White*, born or to be born, as joint-tenants absolutely, but subject to the proviso hereinafter mentioned: and declare that if no child of the said Defendant *Charles Herbert White* shall be living at his death, the said trustees shall stand seised of the said real estates, in trust for the said *Charles Herbert White*, his heirs and assigns, and shall stand possessed of the said personal estate, in trust for

the said *Charles Herbert White*, his executors, administrators and assigns: and refer it back to the *Master* to review his report, and to alter the settlement therein mentioned."

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Some of the parties appealed to the *Lord Chancellor* from the above order. The appeal was heard shortly before the long vacation of 1847; and the Reporter has been informed, that, though it was not finally disposed of before the sittings terminated, his Lordship concurred with the *Vice-Chancellor* in holding that no provision for the wife of *Charles Herbert White* ought to be inserted in the settlement, but differed from him with respect to the mode in which the testator's residuary personal estate ought to be limited, his Lordship being of opinion that the limitations contended for by the daughters of *Charles Herbert White* (*ante*, page 24) ought to be adopted.

It will be seen on referring to the statement of the case (*ante*, p. 17), that the testator gave his linen, china, liquors, &c., to his wife absolutely, and added that the same, together with all her jewels, trinkets, clocks, watches, and ornaments, *might be finally appropriated as she pleased, with the sum of 4,000 l. in money, but which sum he recommended her to divide in certain proportions, amongst Mrs. Wroughton and other persons whom he named.*

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6th Dec.

Trust.

Precatory trust.

Testator gave to his wife, all her jewels, trinkets, &c., which he added might be finally appropriated as she pleased, with the sum of

On the hearing of a petition presented by the execu-

4,000 l. in money; but which sum *he recommended her to divide amongst certain persons in certain shares.* Held, by the *Vice-Chancellor*, that a trust was created in favour of those persons, to take effect after the wife's death. The *Lord Chancellor*, however, held the contrary, on appeal.

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tors, the question was whether a trust was created, as to the 4,000 *l.*, in favour of Mrs. *Wroughton* and the other persons named.

Mr. *Briggs* for the petitioners.

Mr. *James Parker*, contra, contended that no trust was created, on account of the words: "May be finally appropriated as she pleases," and cited *Meredith v. Heneage* (a).

The VICE-CHANCELLOR:

In *Meredith v. Heneage* the objects of the recommendation were uncertain: but, here, both the objects and the subjects are certain; and, therefore, I think that a trust was created.

The *Lord Chancellor**, however, reversed his *Honor's* decision, on the ground that the words: "to be finally appropriated as she pleases," applied to the 4,000 *l.* as well as to the jewels, &c., and, therefore, the case was governed by *Meredith v. Heneage*.

(a) *Ante*, Vol. I. p. 542.

* Lord *Lyndhurst*.

PRESTON v. MELVILLE.*

MELVILLE v. PRESTON.

MELVILLE v. PRESTON.

1845:

27th February.

*Long Annuities.
Tenant for life
of residue.
Enjoyment in
specie.*

SIR ROBERT PRESTON, late of *Valleyfield* in *Scotland*, Bart., by his will dated the 17th of October 1832, and made in the Scotch form, gave all his real and personal estates, whether in *England*, *Scotland*, or elsewhere, to Sir *Coutts Trotter*, *Edward Majoribanks*, and Sir *Edmund Antrobus*, of *London*, bankers, whom he also appointed his executors: and, after declaring the trusts upon which they were to hold his real es-

Testator bequeathed all his personal estate to trustees, whom he directed them to convert it into money, and to pay the in-

terest to certain persons for their lives, then to invest the principal in the purchase of lands; *it being also understood that where his money or personal estate might be lying on undoubted real or personal security, such securities might be only renewed in the names of the trustees.* The testator's personal estate consisted, in part, of Long Annuities. Held that the cestuis que trust for life of the personalty, were not entitled to receive the Long Annuities; but that they must be converted into Consols.

Jurisdiction. — Scotch trustees.

A Scotchman, by a testamentary instrument in the Scotch form, bequeathed all his personal estate to trustees, in trust to pay legacies and annuities, and the income of the surplus to *A.* for life, and, on *A.*'s death, to invest the capital in the purchase of lands in *Scotland*. The trustees named in the will having disclaimed, the Court of Session appointed new trustees, who, as well as *A.* and several of the legatees and annuitants, were resident in *Scotland*. *A.* administered to the testator's estate in *England*: and filed a bill in Chancery, against the trustees, for the usual accounts of the testator's estate possessed by them, and to have the residue ascertained and secured. The trustees filed a cross bill for an account of the testator's estate in *England* possessed by *A.*, and to have the residue ascertained and paid over to them upon the trusts of the will.—The Court refused to relinquish its jurisdiction over the fund in *A.*'s hands, and directed it to be paid into Court and to be invested in Consols, and the dividends to be paid to *A.* for life.

* *Ex relatione*, Mr. *Currey*.

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tate, he directed them to convert the whole of his personal estate into money: but that direction was followed by a proviso in the following words: "It being also understood that, where my money or personal estate may be lying on undoubted real or personal security, such securities may be only renewed in the names of the trustees;" and, after giving legacies and annuities to persons for their respective lives, some of whom were resident in *Scotland*, he directed his trustees and executors to pay the free yearly produce of the rest, residue, and remainder of his whole means and estate, heritable and moveable, to his nieces, Lady *Preston*, *Catherine Preston*, and Lady *Hay*, (all of whom appeared to be resident in *Scotland*,) and to the survivors and survivor of them during their lives and the life of such survivor; and, after the death of the survivor, to invest the whole residue of his personal estate in the purchase of lands in *Scotland*.

The trustees and executors named by the testator having disclaimed and renounced, three other gentlemen (all of whom were resident in *Scotland*) were, with the consent of all parties, appointed, by the Court of Session in *Scotland*, trustees in their place: and Lady *Preston* took out letters of administration to her late uncle's personal estate in *England*, and became his personal representative in *Scotland* also.

On the 1st of February 1836, she filed a bill in this Court, against the trustees appointed by the Court of Session, and the parties beneficially interested under the will, praying for an account of Sir *Robert Preston's* personal estate, and that the residue might be ascertained and secured for the benefit of the parties interested in it.

On the 25th of the same month, the trustees instituted a suit, in the Court of Session, for the purpose of compelling Lady *Preston* to transfer to them, immediately, the whole of the personal estate in *England*, and obtained a judgment in their favour.

On the 23rd of March 1836, the trustees filed a cross bill in this Court, for an account of Sir *Robert Preston's* personal estate in *England*, and of Lady *Preston's* administration thereof, so far as she had administered the same, and that what remained in her hands might be paid over to them upon the trusts of the will, they undertaking to pay the testator's debts and legacies, and to provide for the annuities given by his will: but, if the Court should be of opinion that they were not entitled to such personal estate until after the debts, legacies, and annuities had been paid and provided for, then that the usual accounts might be taken, and the clear residue paid over to them in trust as aforesaid.

On the 28th of April 1838, the trustees filed a supplemental bill, praying that, at the hearing of their suit, regard might be had to the before-mentioned judgment of the Court of Session, and that relief might be granted to them accordingly.

In 1841, the House of Lords reversed the judgment of the Court of Session, on the ground that, if the trustees had any right at all to have the personal estate in *England* paid over to them, they could have no such right until the administration should have been completed in *England*, and the surplus ascertained (a).

(a) The *Lord Chancellor*, in moving the judgment of the House, said as follows: "The administration of the personal

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After the decision of the House of Lords, the three causes in this Court came on to be heard; and, on the 26th of July 1841, a decree was made, in those causes, for the usual accounts, with liberty to the *Master* to state special circumstances. The *Master*, by his report dated 1st of January 1844, ascertained the clear residue of the testator's personal estate in *Eng-*

estate in *England*, rests and must remain with the appellant (*Lady Preston*). If, after such administration shall have been completed, any surplus should remain, and it should appear that there are trusts to be performed in *Scotland* to which it was devoted by Sir *Robert Preston*, it will be for the Court of Chancery to consider whether such surplus ought or ought not to be paid to the pursuers (the trustees), for the purpose of being applied in the performance of such trusts; and, in considering that question, every attention ought to be paid to the authority under which the pursuers have been appointed trustees, and the consent which led to such appointment. It is premature to decide that point, it being, at present, unascertained whether there is any surplus of the personal estate in this country, or what will be the amount of it; and no declaration of right by the Court of Session would be binding on the Court of Chancery, under whose jurisdiction the property in *England* is placed by the suits which have been instituted. But, although the transfer of the surplus of the property in *England*, if any, must depend upon the judgment of the Court of Chancery, it may be very competent to the Court of Session, at the proper time, to declare the rights and duties of the trustees appointed under its authority. But, if such trustees have not any right or title to the funds in *England* until the administration in *England* shall have been completed in *England*, and the surplus ascertained, it does not appear that any benefit can arise from any declaration of such rights and interests until it has been ascertained that there will be any surplus to which such rights and duties will attach. This, however, may be left to the discretion of the Court of Session." See 2 Robinson's Scotch Appeal Cases, pages 106 and 107.

land, and found that it consisted, in part, of 600*l.* Long Annuities, which had been received by Lady *Preston* since the testator's death, and divided amongst herself and the other tenants for life, and that they had thus received 1,784*l.* 10*s.* 5*d.* more than they would have done if the Long Annuities had been converted into Consols at the end of the first year after the testator's death.

On the 28th of February 1845, the three causes were heard for further directions, when Lady *Preston* and Miss *Catherine Preston* insisted that, as the trustees were resident in *Scotland*, out of the jurisdiction of the Court, the residue ought not to be paid over to them, but ought to be paid into Court; and that the interest ought to be paid, from time to time, to Lady *Preston*, Miss *C. Preston*, and Lady *Ilay*, according to the will. On the other hand, the trustees contended that the residue ought to be paid over to them upon the trusts of the will.

Another question was whether the 600 *l.* Long Annuities ought to have been converted, or whether, under the before-mentioned proviso in the will, the tenants for life were entitled to the enjoyment of them *in specie*.

Mr. *Stuart* and Mr. *Hetherington* for Lady *Preston*.

Mr. *James Parker* and Mr. *Currey* for Miss *Catherine Preston*.

Mr. *Lowndes*, Mr. *Koe*, and Mr. *Toller* for the trustees and the other parties.

At the conclusion of Mr. *Toller's* argument, the Vice-

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Chancellor asked Mr. *Stuart* whether he wished to say anything, in his reply, with respect to the Long Annuities, and, on being answered in the negative,

His *Honor* gave judgment as follows :—

The VICE-CHANCELLOR :

It is plain that, in consequence of accidental circumstances, the effect of which the parties did not exactly appreciate, it has happened, as a matter of fact, that Lady *Preston* and her co-tenants for life have received more than, according to the view of the *English* law, they ought to have received ; therefore, if the record is so constituted as that the Court has power to rectify the mistake, my opinion is that it must be rectified.

With respect to the other point, it is clear, from the very fact that the Court is called upon to decide upon this question of restitution by the tenants for life, that something remains to be done in the way of administration ; and it is according to the ordinary jurisdiction of this Court to receive funds, and to administer them under its own jurisdiction as long as it lasts. There are persons standing in the situation of tenants for life to whom the income of the fund may be paid ; and I cannot comprehend what difficulty can possibly arise from the fact that there are some persons in *Scotland* who have rights as annuitants ; for, the whole of the testator's property being dedicated to the same purpose, the trustees may pay the annuities out of the rents and profits of the *Scotch* estates, but, if they do not, this Court may be applied to by them ; and this Court, unquestionably, will direct the payment. It appears to me, therefore, that there is a subsisting trust for this

Court to perform, both with respect to the annuitants, and also with respect to the tenants for life: and, that being so, the Court has jurisdiction over the fund in this suit, and that jurisdiction it ought, in my opinion, to retain.

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MOLE v. MANSFIELD.

1845:
16th July.

THIS was a suit for partition; and the Commissioners having awarded certain sums to be paid for owelty of partition,

Partition.

Commissioners of partition have no power to award sums to be paid for owelty of partition.

The *Vice-Chancellor* said that they had no power so to do; and, one of the parties being an infant, he directed the *Master* to inquire and state whether it was fit and proper that the sums awarded should be accepted (a).

Mr. *Bethell*, Mr. *Anderdon*, Mr. *Daniel*, and Mr. *Hardy* were Counsel in the Cause.

(a) See Seton on Decrees, 189 *et seq.*

1845:

16th July.

*Conversion.
Devisee and
Legatee.
Election.*

By a marriage settlement, real estates were conveyed to trustees in trust to sell and to hold the proceeds in trust for the husband and wife for their lives successively, remainder in trust for their children, remainder in trust for the survivor of the husband and wife absolutely. There was no child of the

marriage. The husband survived his wife, and after her death consulted his solicitors upon his rights under the settlement, and they having advised him that he was entitled to the whole beneficial interest in the estates, he got possession of the settlement, and of the title-deeds, and remained in possession of them, and also of the estates, until his death. Held that thereby he declared his election to take the estates as land.

DAVIES v. ASHFORD.

BY the settlement on the marriage of *William* and *Sophia Davies*, dated in January 1802, estates in *Radnorshire* were conveyed to trustees in trust to sell the same immediately after the marriage, and to invest the proceeds in certain securities; but no sale was to take place during the lives of Mr. and Mrs. *Davies*, or the life of the survivor of them, without their, his, or her consent; and the trustees were directed to hold the securities and the estates until they should be sold, in trust for Mr. and Mrs. *Davies* for their lives successively, and, after the death of the survivor of them, in trust for their children, who, being sons, should attain twenty-one, or, being daughters, should attain that age or marry under it; and, if there should be no such son or daughter, in trust for such person or persons as Mr. and Mrs. *Davies*, or the survivor of them, should appoint, and, in default of appointment, in trust for the survivor absolutely.

Legacies.—Will.—Construction.

Testator bequeathed all his personal estate to *A.*, subject to the payment of his *debts and funeral and testamentary expenses*, and, after charging his real estates with the payment of certain *legacies and annuities*, he devised them to *B.* Held that he had not exempted his personal estate from the payment of the legacies and annuities.

There was no child of the marriage who acquired a vested interest under the settlement. Mrs. *Davies* died in 1838, without having joined with her husband in making any appointment of the trust-property. Mr. *Davies*, after the death of his wife, consulted his solicitors as to his interest under the settlement, and his right to the possession of it and the title-deeds of the estates, none of which had been sold; and they advised him that the beneficial interest in the estates was absolutely vested in him, and that the settlement and title-deeds might be safely delivered to him. He died in 1842. The estates and the title-deeds were in his possession at his death; but how he became possessed of the latter did not appear. By his will he gave all his personal estate to the Plaintiff, subject to the payment of his debts and funeral and testamentary expenses, and charged his freehold estates with the payment of the legacies and annuities thereafter bequeathed; and, subject thereto, he gave all his estates in *Radnorshire* and elsewhere to the Plaintiff and other persons.

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One question in the Cause was whether the estates comprised in the settlement were to be deemed real or personal estate of the testator.

Another question was whether the legacies and annuities were payable out of the testator's personal estate, or were charged exclusively upon his real estates.

Mr. *James Parker* and Mr. *Nevinson* appeared for the Plaintiff, and said, with respect to the first question, that the estates were stamped, by the settlement, with a trust to sell; although that trust was not to be exercised, during the lives of Mr. and Mrs. *Davies* or the

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life of the survivor of them, without their consent ; but that, on the decease of the survivor, the trust was to become absolute, and therefore the estates were converted, out and out, into personalty, and retained that character at Mr. *Davies's* decease ; for he had done no act which showed, unequivocally, that he meant the trust for sale to be at an end, and the estates to retain their original character. *Stead v. Newdigate (a)*, and *Kirkman v. Miles (b)*.

Mr. *Bethell*, Mr. *W. M. James*, and Mr. *Freeling*, appeared for the other parties ; but

The *Vice-Chancellor*, without hearing them, said :

I admit that the settlement contained a clear trust for sale, which must have been exercised unless Mr. *Davies* did some act which showed that he meant the trust to be at an end and to take the estates as land.

It does not distinctly appear in whose custody the title-deeds originally were ; but it is clear that there was a change in the possession of them, and that Mr. *Davies* got them into his custody. Now, was not that, of necessity, a destruction of the trust ? For the trustees could not have compelled Mr. *Davies* to deliver up the deeds ; and, without doing so, they could not have made any effectual sale of the estates. Therefore, it seems to me that, by consulting upon his rights under the settlement, and then taking the deeds into his possession, (from whom or by what means he obtained them, is immaterial,) he made a clear election to take the estates as land.

(a) 2 Mer. 521.

(b) 13 Ves. 338.

Mr. *James Parker* and Mr. *Nevinson* said, with respect to the second question, that the testator had made a specific bequest of his personal estate to the Plaintiff, subject to the payment, not of his legacies and annuities, but only of his debts and funeral and testamentary expenses ; that, by pointing out what burdens his personal estate was to bear, he had expressed, in effect, what burdens it was not to bear ; and that he had charged the latter on his real estates ; which was, in effect, giving certain portions of his real estates to the legatees and annuitants. *Heath v. Heath (c)*, *Amesbury v. Brown (d)*, and *Jones v. Bruce (e)*.

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The VICE-CHANCELLOR :

The cases cited differ essentially from the present. In *Heath v. Heath* and *Amesbury v. Brown*, the legacies were expressly directed to be paid out of the real estate. In *Jones v. Bruce*, the testator not only charged his real estates with the payment of the legacies given to his natural children, but directed that, in a certain event, the trustees of his will should raise, for their maintenance, such annual sums out of the rents of his real estates as should not exceed four *per cent. per annum* upon the amount of their legacies ; and it seemed to me to be absurd that the interest of the legacies should be paid out of the rents, and that the principal should not be paid out of the *corpus* of the real estates. Therefore all those three cases are plainly distinguishable from the present.

The rule of this Court is that all legacies are pay-

(c) 2 P. W. 366.

(d) 1 Vez. 477.

(e) *Ante*, Vol. XI., p. 221.

1845.

DAVIES

v.

ASHFORD.

able, primarily at least, out of the testator's personal estate, unless he has expressed a clear intention that they shall be paid out of his real estate exclusively. In this case I do not think that any such intention is expressed; for, though the testator has subjected his personal estate to the payment of his debts and funeral and testamentary expenses, and then charged his real estates with the payment of certain legacies and annuities, it cannot be argued that the words of subjection, which are unnecessary, must, of necessity, be taken to be words of exemption; or, indeed, that any inference can be drawn from them that the personal estate was not to be primarily liable to the payment of the legacies and annuities. Besides, the testator has not directed that they shall be paid out of his real estates, but has merely charged them upon his real estates. And there is nothing in the nature of the legacies, taken collectively, to show that they were to be paid, primarily, out of the testator's real estates; for, though some of them, I admit, are given in the nature of annuities, the rest are sums in gross, and, as such, required to be paid immediately after the testator's death.

For these reasons, I am of opinion that the testator's personal estate is applicable, in the first instance, to the payment of the legacies and annuities given by his will, as well as to the payment of his debts and funeral and testamentary expenses.

SCOTT v. SCOTT.

1845:
16th July.

Will.
Construction.

THE testator in this case, by his will dated the 8th of May 1836, gave the dividends of a sum of Bank-stock to his daughter, *Ann Scott*, for her life, and directed that his estate in the parish of *Thorpe* should be sold, and the proceeds be placed in the funds for the benefit of his daughter during her life: "On the death of my daughter, the Bank-dividends and the interest of the money from the sale of the *Thorpe* estate, to belong to my son and his children, unless my daughter has married and leaves a child or children who may attain the age of twenty-one years."

The testator died in 1836. In 1838 his daughter married. In 1845 she died, without having had a child.

The testator's son had no child at the testator's death; but he had four children born before the death of *Ann Scott*, two of whom were still living, and were the Plaintiffs in the Cause.

Bequest to testator's daughter for life, and, on her death, to the testator's son and his children. The son had no child at his father's death, but had children living at the death of the daughter. Held that his children were neither joint-tenants with him, nor entitled in remainder after his death, but that the fund belonged to him absolutely.

Mr. *Sidebottom* and Mr. *Prior*, for the Plaintiffs, contended that the son and his children took the property as joint-tenants; for though the latter were not born at the death of the testator, they were born before the death of the tenant for life, when the property *vested in possession*: but if they did not so take, that their father was tenant for life of the property, with remainder to

1845.

SCOTT
v.
SCOTT.

them, as joint tenants *inter se*, absolutely. *Wild's Case* (a), *Heron v. Stokes* (b), *Paine v. Wagner* (c), *De Witte v. De Witte* (d), *Buffar v. Bradford* (e), *Oates v. Jackson* (f), and 2 Powell on Devises, page 496, Jarman's edition.

Mr. *Stuart* and Mr. *Jolliffe* appeared for the Defendant, but

The VICE-CHANCELLOR, without hearing them, said:

This is a very simple case. The gift is to the daughter for life, with remainder to the son and his children, unless the daughter should have a child or children who should attain twenty-one: so that the gift in remainder vested, subject to be divested on the daughter having a child or children who should attain twenty-one. At the death of the testator, there was no person to take in remainder, except the son; and the daughter having died childless, I am of opinion that the son is entitled to the property, absolutely.

I do not see that the case of *Buffar v. Bradford* has any application to this case.

(a) 6 Rep. 16; see 17 b.

(d) *Ante*, Vol. XI., p. 41.

(b) 1 Drury & Warren, 76.

(e) 2 Atk. 220.

(c) *Ante*, Vol. XII., p. 184;

(f) 2 Strange, 1172.

see 188.

DORIN v. HARVEY.*

THIS was a suit, by a vendor, for a specific performance of the agreement.

The Plaintiff suffered nearly a year to elapse after the answer was filed without taking any step in the Cause, and then moved for a reference as to title.

The *Vice-Chancellor* refused the motion, on account of the Plaintiff's *laches*.

Mr. *Bethell* and Mr. *Goldsmid* supported the motion.

Mr. *Stuart* and Mr. *Hall* opposed it.

* *Ex relatione*.

1845:
21st July.

Vendor and
Purchaser.
Reference of
Title.
Laches.

Motion by a
vendor for a
reference as to
title refused,
because he had
been guilty of
laches in prose-
cuting the suit.

NICHOLS v. HASLAM.

THIS was a suit to restrain the infringement of a patent; and, by the decree, the Defendant was ordered to pay the costs of the suit.

of a suit, which were to be paid by the Defendant, a special retainer paid by the Plaintiff to the *Attorney-general*, who did not usually practise in the Court of Chancery, ought to be allowed, although there were no special circumstances which rendered the employing of the *Attorney-general* necessary.

1845:
23rd July.

Costs.
Special
Retainer.

Held that in
taxing the costs

1845.
NICHOLS
v.
HASLAM.

The Plaintiff had employed the then *Attorney-general*, (who did not usually practise in the Court of Chancery), as his Counsel on a motion in the Cause, made in 1843, after the Court had risen for the long vacation, and had paid him a fee of fifty guineas by way of special retainer, and also thirty guineas with his brief.

On the hearing of a petition presented by the Defendant, the question was whether the Taxing-master was justified in allowing, as he had done, the special retainer; it appearing, by affidavit, that several Queen's Counsel who usually practised in the Court of Chancery, were in town when the motion was made; and, it was said that, therefore, and as the motion was one of the most ordinary description, it was unnecessary to employ a Counsel who did not usually practise in that Court.

Mr. *Stuart* and Mr. *Follett* supported the petition.

Mr. *Bethell* opposed it.

The VICE-CHANCELLOR :

The objection is not that the fee is excessive, but because an eminent Counsel was employed who did not practise in this Court. If the objection was to the Counsel, it ought to have been made at the time.

I think that a most serious blow would be aimed at the liberties of the people of *England*, as represented by Counsel, if I were to interfere in this case. Every suitor has a right to choose his own Counsel; and, if the Plaintiff in this case thought proper to employ the first Counsel at the bar of either Court, my opinion is that he had a right to do so.

Petition dismissed, with costs.

MATTHEWS v. GABB*.

1845:
23rd July.

AFTER a trustee for sale of a testator's estates had sold part of them and paid the proceeds into Court in a suit for administering the testator's property, a party entitled to a share of it under the testator's will, assigned his interest to one *Smith*, by way of mortgage; and *Smith* gave notice of the assignment to the trustee, but did not obtain a stop order. The remainder of the estates was afterwards sold under the decree in the suit, and the proceeds paid into Court. Subsequently the assignor took the benefit of the Insolvent Debtors' Act.

*Chose in Action.
Order and
Disposition.
Notice.*

On the hearing of a petition presented, by the assignee, for payment of what was due on the mortgage, out of the share assigned to him, the question was whether the notice given to the trustee was sufficient to take the share out of the order and disposition of the assignor, or whether the assignee ought not to have obtained a stop order for that purpose; inasmuch as the trustee, at the time of the notice, had parted with a portion of the fund.

Mr. *Bethell* and Mr. *Babington* appeared for the petitioner.

Mr. *Follett*, for the assignee of the Insolvent Debtors' Court, relied on *Greening v. Beckford* (a).

A trustee for sale of a testator's estates, sold part of them and paid the proceeds into Court. A party entitled to a share of the testator's property, assigned his interest to *S.* by way of mortgage; and *S.* gave notice of the assignment to the trustee, but did not obtain a stop order. The remainder of the estates was afterwards sold and the proceeds paid into Court under the decree in the suit. Subsequently, the assignor took the benefit of

the Insolvent Debtors' Act.

Held that the notice given to the trustee, was sufficient to take the assigned share out of the order and disposition of the assignor.

* *Ex relatione.*

(a) *Ante*, Vol. V. p. 195.

1845.

Mr. *Rogers* appeared for another party.

MATTHEWS

v.

GABB.

The VICE-CHANCELLOR considered that the notice given to the trustee was sufficient ; because, when it was given, part of the testator's estates remained to be sold, and the sale could not have been effected without the concurrence of the trustee.

1845 :

5th Nov.

HOLLINGSWORTH v. GRASETT.

Will.
Construction.

Testator bequeathed his residuary estate to *A.*, the executor and trustee of his will; with a gift over in case of the death of *A.*, so that he might not be enabled to perform the duties thereby required of him. *A.* proved the will, but died before he had fully performed the trusts of it. Held that, by merely proving the will, he entitled himself to the residue absolutely.

THE testator in this Cause, by his will dated the 19th of February 1815, directed his debts to be paid as soon as possible after his decease, and then expressed himself as follows : " To effect the above purposes and others hereafter to be named, I will and direct my estates, *Fisher Pond* and *Halton*, be kept together until the month of August 1816 ; the crops arising therefrom to be applied to liquidate the debts I may die owing ; and, at that period, I desire the said estates to be sold by my friend *William Grasett*. Out of the monies arising from the sale of the said estates, I desire the balance of debts that may be owing from me to be paid, and the residuum of money arising therefrom, that is, what may remain after payment of my debts as aforesaid, together with any sums due to me at my death or that may arise from the sale of my personal property, which is to be disposed of immediately after my death, I give and bequeath to my friend the said *William Grasett*."—The testator then gave several annuities and sums in gross ; and, as to one of the latter, directed that it should not be paid until the expiration of *four* years

after his death:—"All the rest, residue, and remainder of my estates real and personal, of every quality and kind whatsoever, all that may remain after the payment of legacies and annuities, I give and bequeath to my friend *William Grasett* and his heirs for ever: and I nominate and appoint him executor to this my will and testament, as well as trustee as aforesaid. But, *in case of the death of my said friend William Grasett, so that he may not be enabled to perform the duties which hereby be required of him*, I then nominate and appoint my friend *Philip Caddell* executor and trustee *for all the purposes* for which I have nominated and appointed my said friend *William Grasett*, excepting as to the residuum of my estate, which I should then wish to be divided, share and share alike, between the heirs of my said friend *William Grasett*, my said friend *Philip Caddell*, and my brother *A. R. Hollingsworth*, or their heirs."

1845.
HOLLINGS-
WORTH
v.
GRASETT.

The testator died in March 1815. *Grasett* proved his will, provided funds for payment of the annuities given by it, and did every other act which it was his duty to do as an executor and trustee of the will, except that he did not sell the *Fisher Pond* estate, but remained in possession of it until his death. He died in 1841; at which time some of the annuitants were still living.

On the argument of a demurrer put in, by *Grasett's* son and heir, to a bill filed by the testator's brother, the question was whether the gift over of the residue did not take effect on *Grasett's* death, in consequence of his having left the *Fisher Pond* estate unsold and some of the annuities given by the will still subsisting.

Mr. *Burge* and Mr. *Dickinson*, in support of the de-

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murrer, said that, by the words: "in case of the death of my said friend *William Grasett*, so that he may not be *enabled* to perform the duties hereby required of him," the testator meant: "in case of the death of my said friend *William Grasett* in my lifetime;" for, in that case, he would have been *disabled* from performing the duties required of him; that it further appeared that such was the intention of the testator, from his having appointed *Caddell* executor and trustee, not for the purposes that might be left unperformed by *Grasett*, but for *all* the purposes of his will; that as *Grasett*, who was the original executor, had proved the will, *Caddell* could not clothe himself with the character of executor; for the Ecclesiastical Court would not grant probate of the will to *Caddell*, who was merely the substituted executor: *Swinb. on Wills*, part 4, sect. 90.

Mr. *Dickinson* said that *Grasett* had performed all the duties required of him by the will; for he had sold the only estate that it was requisite for him to sell, and paid the testator's debts, funeral and testamentary expenses and legacies, and provided funds for payment of the annuities; and that, if he had merely proved the will, he would have been entitled to the residue absolutely; for he would then have been *enabled* to perform the duties which the will required of him: *Harrison v. Rowley* (a), *Brydges v. Wotton* (b).

Mr. *Bethell*, Mr. *Terrell*, and Mr. *Collins*, in support of the bill, contended that the testator meant the gift over to take effect in case *Grasett* should die, at any time, without having fully performed the duties required

(a) 4 Ves. 212.

(b) 1 V. & B. 134.

of him by the will. They cited *Home v. Pillans* (c), *Tanner v. Tebbutt* (d), and *Baker v. Martin* (e).

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HOLLINGS-
WORTH
v.
GRASETT.

The VICE-CHANCELLOR :

It is unreasonable to suppose that the testator intended that, unless *Grasett* survived all the annuitants, the residue should go over from him. However, the question which I have to decide, is not whether the intention of the testator was reasonable or unreasonable, but what is the true effect of the words which he has used? They are not those which the Plaintiff's Counsel have put into the mouth of the testator, namely: "in case my said friend *William Grasett* shall die before all the trusts of this my will shall be lawfully performed;" but they are: "But in case of the death of my said friend *William Grasett*, so that he may not be enabled to perform the duties which hereby be required of him, I then nominate and appoint my friend *Philip Caddell* executor and trustee for all the purposes for which I have nominated and appointed my said friend *William Grasett*, excepting as to the residuum of my estate, which I should then wish to be divided, share and share alike, between the heirs of my said friend *William Grasett*, my said friend *Philip Caddell*, and my brother *A. R. Hollingsworth*, or their heirs." So that the testator merely contemplated the contingency that *Grasett* might live so long as that he might be *able* to perform the duties required of him by the will. If then he had lived only until he had proved the will, he would have become absolutely entitled to the residue; for he would have endued himself with the ability to perform the duties

(c) 2 Myl. & Keen, 15. (d) 2 You. & Coll. N. C. 225.
(e) *Ante*, Vol. VIII. p. 25.

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 v.
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which it required of him; and, having proved the will, he might have filed a bill in the Court of Chancery, and called upon the Court to perform the trusts.

My opinion is that, in the events that have happened, the words of the will, as they stand, clearly entitle *Grasett* to the residue absolutely.

Demurrer allowed.

1845:
 17th & 18th
 Nov.

SMITH v. WARDE.
 DUCKETT v. WARDE.

*Voluntary
 Transfer of
 Stock.
 Trust.
 Parent & Child.*

A. directed his agents to invest part of his balance in their hands, in the purchase of 4,000*l.* stock, in the names of himself and his wife, in trust for his infant son. The agents made the purchase in the joint names; but without any trust expressed, because, as they afterwards informed *A.*, the Bank objected to trust accounts appearing on their books. *A.* allowed the stock to remain without any trust being declared, and received the dividends of it down to his decease. Held that neither his son nor his wife (who survived him) were entitled to the stock, but that it formed part of his assets.

ON the 2nd of April 1834, Sir *Lionel Smith*, the testator in the Cause, who was then Governor of *Barbadoes*, wrote a letter to Mr. *George Forbes*, a partner in the house of *Forbes & Co.*, his agents in London, which was, in part, as follows :—" Look at my account current, and see, when the quarter due shall be paid, what balance I may have; and, if my account can possibly bear it, make a purchase in some public stock you and your good father may think best, to the extent of 4,000 *l.* or 5,000 *l.*, for my boy *Lionel Eldred*, who is this day twelve months old. Let it be in my own name and in my wife's, Lady *Isabella Smith's*, in trust for *Lionel Eldred Smith*." The writer concluded with requesting that,

when the purchase should be made, Mr. *Forbes* would communicate the contents of his letter to Lady *Smith*, who was then at *Florence*. On the 17th of April *Forbes & Co.*, in compliance with Sir *Lionel's* request, purchased 4,000 *l.* New Three-and-half per Cents., in the names of Sir *Lionel* and Lady *Smith*; and, in May following, Mr. *Forbes* wrote to Lady *Smith*, and, after informing her of the purchase, added that the Bank objected to trust-accounts being placed on their books. On the 3rd of June, Lady *Smith* acknowledged the receipt of Mr. *Forbes's* letter, and expressed herself highly gratified with the purchase that had been made, which she termed a present from Sir *Lionel* to his dear son. On the 24th of the same month, Mr. *Forbes* wrote to Sir *Lionel*, and, after informing him of the purchase, added: "I now send you the transfer stock receipt, which, you will see, bears your own name and that of your wife's. It could not be done as you desired, for the Bank objects to trust-accounts on their books." Sir *Lionel*, in reply, thanked Mr. *Forbes* for the trouble he had taken in the investment of money in the stocks for his boy: and, afterwards, wrote a letter to Sir *Charles Forbes*, the father of Mr. *Forbes*, in which he thanked Sir *Charles* for his assistance in getting the little present secured to his boy, adding, that it would be useful to him thereafter, if it pleased God to spare him.

In March 1838, Sir *Lionel* wrote to *Forbes & Co.*, stating that, being anxious to settle on his son the sum of 8,000 *l.* which he had deposited with them, and for which they were to pay him interest at 5*l.* per cent., he wished it to be invested in the New Three-and-a-half per Cent. Stock, or any other Government security they might deem more advisable, in his own and Lady *Smith's* name, as the 4,000 *l.* had been. *Forbes & Co.*

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complied with the directions contained in that letter; and, in May 1838, informed Sir *Lionel* that they had done so, and that there was only one account, at the Bank, for both the sums of stock which they had purchased in his and Lady *Smith's* name. In June following Sir *Lionel* wrote a letter to Lady *Smith*, which contained the following passages :—"The agents have transferred the 8,000 *l.* which I had in deposit with them at 5*l.* per cent., and which gave me 400*l.* a year, into the New Three-and-a-half per Cents., which will only give me 280*l.* a year, a loss of income of 120*l.* a year; but I thought it best not to run any risk, and that it was better for me to lose income than my boy should, perhaps, lose his all; for, if it pleases God to spare me so that I can save a little more for my children, *I intend to leave all the money I have in the New Three-and-a-half per Cents.* to go to *Lionel*. It is invested in yours and my name, and now amounts to 12,000*l.*" In 1839, Mr. *Forbes* received a letter from Sir *Lionel*, which was partly as follows :—"I believe I did wrong in taking the 8,000 *l.* out of the deposit with your house at 5*l.* per cent.; but commercial misfortunes came so thick from the East, I was under a panic what would become of my children if such misfortunes came upon your house; for, possessed as you are, largely, of wealth and prudence, misfortune has no respect of persons." The dividends of the 12,000*l.* were regularly received, by *Forbes & Co.* as Sir *Lionel's* agents, and credited to his account in the same manner as other monies received by them on his account; and he, from time to time, drew upon *Forbes & Co.* in respect of the monies placed to his credit; and accounts, in which the dividends were treated as monies belonging to Sir *Lionel*, were regularly rendered to him by *Forbes & Co.*, without any objection being made by him, on account of the dividends being so treated: and

some papers in his own handwriting were in his possession at his decease, in which the 12,000 *l.* was included as part of his own property, and as subject to the dispositions of his will. He died on the 2nd of January 1842, and Lady *Smith* died shortly afterwards. By his will, dated the 1st of May 1841, he gave all his property to his wife during her widowhood, and, on her death or second marriage, he gave 15,000 *l.* to his son, Sir *Lionel Eldred Smith*, on his attaining twenty-one, and 7,500 *l.* to each of his three daughters, on their attaining that age: but his assets, exclusive of the 12,000 *l.* stock, were insufficient to pay those legacies.

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At the hearing of the Cause for further directions, the questions were, first, whether the stock was part of Sir *Lionel's* assets; secondly, whether it was the property of his son independently of his will; and, thirdly, whether Lady *Smith* became entitled to it by surviving her husband?

Mr. *Bethell* and Mr. *J. Baily*, for two of the testator's daughters, and Mr. *K. Parker* and Mr. *Calvert* for the other daughter, said that the trust as to the 12,000 *l.*, if any was intended, was incomplete: first, because Sir *Lionel* never parted with his control over the fund; for though it was invested in the joint names of himself and his wife, he alone might have transferred it whenever he thought proper; and, secondly, because the transaction by which the trust was said to have been created, was never communicated to the alleged *cestui que trust*; and, consequently, this Court would not interfere on his behalf: that the two investments must be taken as only one transaction; and it appeared, from the correspondence, that Sir *Lionel's* object in directing

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them, was merely to secure his property from the risk to which he considered it to be subject in the hands of a mercantile firm; and, moreover, that he had treated and dealt with the fund as his own property, down to the day of his death: *Sloane v. Cadogan* (a), *Ward v. Audland* (b), *Gaskell v. Gaskell* (c), and *Beatson v. Beatson* (d).

Mr. *Stuart* and Mr. *Shadwell*, for the personal representatives of Lady *Smith*, contended that no equity attached on the fund, and therefore the legal right must prevail; and, consequently, that Lady *Smith* became entitled to the fund by survivorship. They cited *Bill v. Cureton* (e), *Tufnell v. Constable* (f), *Pringle v. Hodgson* (g), *Glaister v. Hewer* (h), *Wildman v. Wildman* (i), *Antrobus v. Smith* (k), *Rodgers v. Marshall* (l), and *Paton v. Sheppard* (m).

The VICE-CHANCELLOR :

It appears, from the letter which Lady *Smith* wrote to Mr. *Forbes*, that she did not conceive that the stock was transferred into her name for her benefit.

Mr. *Wakefield* and Mr. *Lewis*, for Sir *Lionel Eldred Smith*, said that the contents of the papers which were in Sir *Lionel*'s possession at his death, were immaterial,

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| (a) 3 Sugd. Vend., App. 66. | (f) <i>Ante</i> , Vol. VIII. p. 69, |
| (b) <i>Ante</i> , Vol. VIII. p. 571, | and 8 Beav. 201. |
| and 8 Beav. 201. | (g) 3 Ves. 617. |
| (c) 2 Youn. & Jerv. 502. | (h) 8 Ves. 195. |
| (d) <i>Ante</i> , Vol. XII. p. 281. | (i) 9 Ves. 174. |
| See also <i>Dillon v. Coppin</i> , 4 | (k) 12 Ves. 39. |
| Myl. & Cr. 647. | (l) 17 Ves. 294. |
| (e) 2 Myl. & Keen, 503. | (m) <i>Ante</i> , Vol. X. p. 186. |

as the question was what he intended when he directed the stock to be purchased ; and that it appeared, from his letters, that he then intended his wife and himself to be trustees of the stock for his son, and that those letters constituted a written declaration of the trust: *Macfadden v. Jenkins* (n), *Wheatley v. Purr* (o), (which overruled *Gaskell v. Gaskell*), *Dummer v. Pitcher* (p), *Ex parte Pye* (q), and *Collinson v. Patrick* (r).

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The *Vice-Chancellor*, in the course of the argument for Sir L. E. Smith, asked the following questions: Was the trust which you contend for, a trust *in præsentia*, or a trust to take effect in the event of the son surviving his father? When did it become manifest that the son had either an interest in possession or in reversion? I admit that Sir Lionel intended to do something for his son, but the question is whether his words are to be taken strictly, or with reference to what he thought to be the state of the law, without exactly knowing it? Would he not have been surprised if he had been told that all the dividends which he had received were his son's? His acts shew that he did not intend what his letters express, namely, that the two sums of stock should, as soon as they were purchased, become the property of his son.

THE VICE-CHANCELLOR:

This is a very extraordinary case; but I feel that, if I were to decree in favour of the infant, I should be doing an act of complete injustice; for I am persuaded

- (n) 1 Hare, 458, and 1 and 2 Myl. & Keen, 62.
Phill. 153. (q) 18 Ves. 140.
(o) 1 Keen, 551. (r) 2 Keen, 123.
(p) *Ante*, Vol. V. p. 35,

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that Sir *Lionel* never intended that construction to be put upon his acts, which the Counsel for the infant have contended for.

No one who looks at the correspondence can help being struck with the looseness of the expressions used in it. The testator first directs the 4,000 *l.* to be invested in the purchase of stock in the names of himself and his wife, Lady *Smith*, in trust for his son *Lionel Eldred*. That, certainly, appears to be very plain. However, when *Forbes & Co.* came to act upon his letter, they found that they could not do exactly what he had directed; and Mr. *George Forbes* so informed him in these words:—"I now send you the transfer stock-receipt, which, you will see, bears your name and that of your wife. It could not be done as you desired; for the Bank objects to trust-accounts on their books." So that Sir *Lionel* was told, distinctly, that the investment had been made, but that it could not be made as he had directed. Now, I cannot proceed upon any fanciful supposition as to what Sir *Lionel* might conceive to be the effect of that transaction; but, for the purposes of adjudication, I must consider what was the effect of it according to law; and if I find that a man directs a sum of stock to be invested in the joint names of himself and his wife, with an express trust for a third person, and that, after being informed that the investment had been made in the joint names but without any trust being declared, he suffers the stock to remain in that state, I must consider that, whatever his original intention may have been, he was content that it should continue under his own absolute dominion.

The whole correspondence also shews that Sir *Lionel Smith* never had any conception that an immediate and

express trust was created for his son. He seems to have thought that there was more probability of his money being preserved for the benefit of his family after his death, if it were invested in stock, than if it were suffered to remain in the hands of his agents, and, for that reason, to have directed it to be invested.

Then comes the investment of 1838, which was directed to be made in the same manner as that of 1834 : and so, in effect, it was. But that, too, left the stock completely under the dominion of Sir *Lionel*.

Besides which we find that, from the times when the two sums of stock were purchased, they were treated, by Sir *Lionel* and his agents, as his own property. The dividends were received by his agents, no doubt under a power of attorney from him, and were placed to his account. Could anything be more unjust than to say, from inferences drawn from vague expressions in letters, that the father intended himself to be a trustee of the stock for his son ; and that, therefore, not only the capital, but all the dividends which he received, belonged to his son : the effect of which would be that the dispositions which the father made of his property, would all be defeated, and his affairs would be thrown into a state which he never contemplated ; and that too in a case in which no one can say whether the trust for the son was a trust *in præsenti*, or only in case he survived his father, and perhaps his mother also ; for the time at which the son's claim commenced, cannot be defined.

The transfer, though made into the joint names of Sir *Lionel* and his wife, gave Sir *Lionel* the complete dominion over the stock, and he exercised that dominion

1845.

SMITH
v.
WARDE.
DUCKETT
v.
WARDE.

1845-

SMITH
v.
WARDE.DUCKETT
v.
WARDE.

down to the time of his death ; and therefore I consider I am bound to declare that neither his son nor his wife have any claim upon the stock, but that it remained part of his assets at the time of his death.

1845 :
18th & 19th
Nov.

*Pleading.
Supplemental
Bill.*

A. filed an original bill and afterwards another bill, which he prayed might be taken as supplemental to the former, against B. Some of the statements in the latter were not only inconsistent with, but contradictory to some of the statements in the former.

Both bills were dismissed with costs.

BLACKBURN v. STANILAND.
BLACKBURN v. STANILAND and SAWLEY.

THE bill in the original Cause was filed, in March 1841, by *Blackburn*, on behalf of himself and all the other simple contract creditors of *Thomas Clifford*, deceased. It stated that *Clifford*, by his will, nominated the Defendant the executor thereof, and that he had duly proved the will and taken upon himself the execution of it, and possessed himself of the whole of the testator's personal estate, and had entered into possession of an inn which the testator occupied at his decease, and was carrying on the testator's business of an innkeeper therein, with the stock in trade left by the testator at his death. The bill further alleged that the Defendant pretended that he had never, in fact, proved the will, whereas the Plaintiff charged the contrary, and that, if the Defendant had not proved the will, he had *purposely abstained from so doing*, and had, nevertheless, possessed himself of all the testator's personal estate, as executor of his will, and paid some of his debts, and given receipts for monies due to the testator, and sold and disposed of divers parts of the testator's personal estate, and, in all other respects, held himself forth and acted as the executor of the will and the legal

personal representative of the testator; and that thereby he had become responsible for the testator's personal estate, and was an executor of his own wrong of the testator's will, and, as such, liable to the suits of parties having claims against the testator's estate.

The answer, which was filed in December 1842, admitted that the testator had appointed the Defendant the executor of his will, but denied that the Defendant had proved it, and added that the Defendant, for some time previous to the testator's death, managed the inn for the testator, at a weekly salary; and that, on the testator's death, some of his creditors considered that it would be beneficial to his estate to keep the inn open until an opportunity occurred of disposing of the goodwill, stock in trade, and furniture thereof, by private contract rather than by public auction; and, accordingly, at their earnest request, the Defendant continued to manage the inn at the same salary as he had received prior to the testator's death, until the 16th of March 1841, when the creditors, finding that the business was being carried on at a loss, directed the stock in trade and furniture to be sold, and the proceeds, after deducting some payments made thereout, to be deposited in the bank of *Parker, Shore, & Co.*, to the credit of the testator's estate; and, at the same time, possession of the inn was given up to the owner thereof. The answer further stated that the Defendant had not taken upon himself the execution of the will; or, save as such manager as aforesaid, possessed himself of any part of the testator's personal estate, or paid any of his debts, or given receipts for monies due to him, or held himself forth or acted as the executor or personal representative of the testator, and therefore that he had

1845.

BLACKBURN
v.
STANILAND.
BLACKBURN
v.
STANILAND
and
SAWLEY.

1845.
 BLACKBURN
 v.
 STANILAND
 BLACKBURN
 v.
 STANILAND
 and
 SAWLEY.

not become responsible for the testator's personal estate, and was not an executor of his own wrong of the will.

In July 1843, the Plaintiff filed another bill against *Staniland*, and also against *James Sawley*, (who, as appeared from the answer, had acted as solicitor to the testator's creditors). That bill was in the following form: "That the Plaintiff, on behalf of himself, &c., exhibited his bill of complaint in this honourable Court, on or about the 12th day of March 1841, against *John Staniland*, thereby stating, as the fact was, that *Thomas Clifford* was, in his lifetime and at the time of his death, justly and truly indebted to your orator in the sum of 99 l. 11 s., &c. &c.; and that the said *Thomas Clifford* departed this life in the month of December 1840, *but which was erroneously stated* instead of the month of November 1840, &c. &c.; and further stating, *but erroneously*, that, after the death of the said testator, the said *John Staniland*, as such executor as aforesaid, duly proved the said testator's said will in the proper Ecclesiastical Court, and thereby became and then was the sole personal representative of the said testator; and further stating that the said *John Staniland*, as such executor as aforesaid, undertook the burthen of the execution of the said will, and possessed himself of all the said testator's personal estate, and had ever since continued and then was in such possession and in the occupation of the inn called the *Palace Inn*, which had been holden by the said testator; and further stating, as the fact was, that the said *John Staniland* had been carrying on the said testator's business of an innkeeper in the said inn since his death, and was still carrying on the same there." The second bill then set forth the contents of the answer to the

first ; after which it alleged, that on the 10th of April 1843, the Plaintiff obtained letters of administration to the testator, with his will annexed. It next charged both the Defendants with having intermeddled, in various ways, with the testator's estate, before those letters of administration were granted and when there was no executor of the testator, except in so far as the Defendants, by their acts, constituted themselves executors or became answerable as such : and it prayed for an account of the testator's estate possessed by the Defendants or either of them ; that *Staniland* might be compelled to answer for all the personal estate ; that *Sawley* might be compelled to answer, either severally or jointly with *Staniland*, for so much of it as had been possessed by him ; and that they might be, jointly or severally, held liable for all loss that might accrue to the estate by reason of the bankruptcy of *Parker, Shore, & Co.* (which had then recently taken place) ; and that *Staniland* might be charged with all loss which should appear to have arisen from carrying on the testator's business ; and that, in taking the said accounts, the Defendants might be respectively charged in respect of their gross receipts, without allowances. "*And that, if necessary, this suit may, as against the said John Staniland, be considered as supplemental to the said first-mentioned suit.*"

1845.
BLACKBURN
v.
STANILAND.
BLACKBURN
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STANILAND
and
SAWLEY.

The cause now came on to be heard.

Mr. *Bethell* and Mr. *Tillotson*, for the Defendant *Staniland*, objected that the Plaintiff sued in two different characters, namely, as a creditor by the first bill, and as the executor of the testator by the second ; and that the second contained statements which flatly contradicted the statements in the first ; and, therefore, that it was impossible for the Court to make any decree : *Colclough*

1845.
 BLACKBURN
 v.
 STANILAND.
 BLACKBURN
 v.
 STANILAND
 and
 SAWLEY.

v. *Evans* (a). They added that the Plaintiff, instead of filing the second bill, ought to have amended the first.

Mr. *Stuart* and Mr. *Campbell*, for the Plaintiff, said that he continued a creditor although he had become the executor of the testator; and that the foundation of the first bill was not taken away by the second, nor was there, in fact, any inconsistency between them, for the first, as well as the second, alleged, in effect, that *Staniland* had acted as executor without having proved the will: *Crompton v. Wombwell* (b).

Mr. *James Parker* and Mr. *Buller* appeared for the Defendant *Sawley*.

The VICE-CHANCELLOR:

The question which I have to decide is not whether, regard being had to the circumstances of the case, the Plaintiff is right; but whether, adverting to the state of the pleadings, he can obtain the relief which he asks.

Now, the second bill does not contain any of the formal language which is usually found in supplemental bills. It does not characterise the first as an original bill; nor does either state or charge anything by way of supplement: it merely asks, at the conclusion of the prayer, that, if necessary, the second suit may be considered as supplemental to the first; and I cannot but think that the Plaintiff, before he filed the second bill, ought to have applied to the Court for leave to amend the first bill, by adding parties and otherwise as he might be advised. If such an application had been

(a) *Ante*, Vol. IV. p. 76. (b) *Ante*, Vol. IV. p. 628.

made, the Court might, perhaps, have acceded to it ; but the Defendant did not take that course ; and the consequence is that I am now called upon to pronounce judgment upon the whole record constituted, as it is, of the two bills and the answers to them, and supported by evidence on both sides.

It is very important that the rules of pleading should be well defined, well known, and uniformly acted upon ; for the object of them is to promote and assist the administration of justice. Let us see then whether the course which the Plaintiff in this case has pursued, conduces to the attainment of that object.

By his first bill he sues on behalf of himself and all the other creditors of a testator, and alleges that *Staniland* has proved the testator's will. By his second, he sues simply as an individual, in his representative character, and alleges that the statement, in the first bill, that the Defendant to it had proved the will, was erroneous, and that he himself had procured letters of administration with the will annexed, to be granted to him. Again, the Plaintiff, by his first bill, represents that *Staniland* alone had possessed himself of the whole of the testator's estate ; but, by his second bill, he alleges that *Sawley* has possessed part of it. So that the two bills contain contradictory and inconsistent statements. It is true that the Plaintiff says, in his second bill, that the statement in the first, that *Staniland* had proved the will, was erroneous. But I cannot take it to be erroneous merely because he says it is : and it is not for me to look into the evidence when the Plaintiff has contradicted himself on the record.

I quite agree that, if a Plaintiff states a case consist-

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BLACKBURN
v.
STANILAND.
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and
SAWLEY.

1845.
BLACKBURN
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STANILAND
BLACKBURN
v.
STANILAND
and
SAWLEY.

ing of several circumstances, he may be entitled to relief, though not on all the circumstances. But there is an essential difference between a record containing statements which partly fail, and a record containing statements which are inconsistent with each other. It is evident that the latter, if entertained, would tend to obstruct the course of justice instead of assisting it, and, therefore, would be a violation of the very principle on which the rules of pleading are framed.

The Plaintiff, as I before suggested, ought to have asked the leave of the Court to amend his first bill; and, if the Court granted the application, he ought to have amended it by correcting those statements which, in his second bill he alleges to be erroneous. But, if the Court refused the application, he ought to have dismissed the first bill and paid the costs of it, and then filed a new, original bill. He did not however think proper to take either of those courses, and, therefore, instead of paying the costs of one bill, he must pay the costs of two.

Dismiss both bills with costs, but without prejudice to the Plaintiff filing a new bill.

PEACOCK v. KERNOT.

1845 :
20th Nov.

MOTION for Defendant, that the last interrogatory for the examination of the Plaintiff's witnesses might be expunged, and the deposition thereto suppressed, because the words, "or either of them," were omitted in it.

Interrogatory.

The last interrogatory for the examination of witnesses expunged, and the deposition to it suppressed, because it did not contain the words "or either of them."

Mr. Wakefield and Mr. Shebbeare moved.

Mr. Bethell and Mr. Cole opposed.

The *Vice-Chancellor* made the order, saying that, on account of the omission, the interrogatory was neither in the words nor to the effect prescribed by the 32nd General Order of December, 1833.

GLASSE v. MARSHALL.

1845 :
22nd & 23rd
November.

MOTION to dissolve an injunction restraining the Defendant, Mrs. Marshall, the Plaintiff's daughter, from selling, assigning, transferring or parting with certain India bonds, and from receiving the principal or the interest secured thereby, and to restrain the Defendants, the India Company, from paying the principal or the interest to her, or to any person except the Plaintiff.

*India bonds.
India Company.
Jurisdiction.
Injunction.*

The Court of Chancery has jurisdiction to restrain the India Company from paying the money secured by their

The Plaintiff and his late wife had lived separate

bonds to a person who has wrongfully obtained possession of them, or to any other person than the lawful owner of them.

1845.

GLASSE

v.

MARSHALL.

from each other for some time prior to the death of the latter. On her death, *Mrs. Marshall* went to the house in which she resided, and got possession of several India bonds, which she had purchased with property which accrued to her after the separation, and refused to deliver them up to the Plaintiff, notwithstanding he had taken out administration to his wife.—The Plaintiff had given notice to the Company not to pay the money due on the bonds to *Mrs. Marshall*, but they refused to accept the notice.

Mr. Stuart, *Mr. L. Wigram*, and *Mr. Lloyd*, for the East India Company, said that, under 51 Geo. 3, c. 64, s. 4 (a), India bonds passed by delivery, and were pay-

(a) That section is as follows:—"And whereas bonds issued under the common seal of the said united company, for money borrowed by them by virtue of the powers enabling them to borrow money upon bond, have usually been entered into, and have been expressed to have been made payable to the person who, for the time being, has been the treasurer of the said united company, or his assigns, and, upon his indorsement thereof, they have been sold and passed from one person to another, by delivery of the possession thereof; and it is expedient that a legal effect should be given to such mode of transfer of the property in the said bonds, and the money secured thereby; Be it therefore further enacted, that all bonds issued, or to be issued under the common seal of the said united company, by virtue of any power by which they have been, are, or hereafter may be authorised to borrow money upon their bonds, shall be assignable and transferrable by delivery of the possession thereof; and, upon every such assignment or transfer, the money secured by the bond so assigned or transferred, and due and to become due thereon, and the property in such bond, shall be absolutely vested, as well at law as in equity, in the person or persons, body or bodies politic and corporate, to whom the same shall be so assigned or transferred; and the person or persons, body or

able, like bank-notes, to the holder or bearer of them, who, therefore, might bring an action against the Company if they refused to pay the money secured; and consequently the Court had no power to grant the injunction, and none such had been granted before. In addition to which, the interference of the Court would tend greatly to depreciate the Company's securities.

1845.
GLASSE
v.
MARSHALL.

Mr. *Bethell* and Mr. *Speed*, for the Plaintiff, contended that India bonds did not pass except by assignment as well as delivery; and that the effect of the enactment referred to, was merely to vest in the assignee the legal as well as the equitable interest in the bonds: that the bonds in question had never been either assigned or transferred to Mrs. *Marshall*: that it could not be contended that this Court had no jurisdiction to restrain the maker of a promissory note from paying the amount to a person who had fraudulently obtained possession of it; and that there could be no doubt that the Court would, if it were necessary to do so, restrain the Bank

bodies politic and corporate, to whom any such bond shall be so assigned and transferred, and his, her, or their executors, administrators, and successors respectively, shall and may maintain his, her, or their action for the principal and interest secured thereby and due thereon, or otherwise relating thereto, in like manner as the obligee or obligees named in any such bond, or his, her, or their executors, administrators, or successors, may now maintain any action thereon; and, in every such action, the plaintiff or plaintiffs shall recover his, her, or their debt, damages, and costs of suit; and if any such plaintiff or plaintiffs shall be nonsuited, or a verdict be given against him, her, or them, the defendant or defendants shall recover his, her, or their costs against the plaintiff or plaintiffs, and every such plaintiff or plaintiffs, defendant or defendants respectively recovering, may sue out execution for such debt, damages and costs by *capias, fieri facias, or elegit*."

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from paying the amount of a bank-note to a person who had wrongfully obtained possession of it: that the value of the Company's securities would be increased rather than diminished by the Court interfering to prevent the payment of them to a fraudulent holder.

Mr. *Burge*, Mr. *Roundell Palmer*, and Mr. *Tripp* appeared for other parties.

The VICE-CHANCELLOR :

As to the general right of the Court to interfere by injunction in a case like this, I have no doubt whatever. It is inherent in this Court to exercise jurisdiction in all cases of fraud ; therefore it must have jurisdiction in this case, unless the words of the Act of Parliament that have been referred to, are so precise and cogent as to take it away. I do not see anything in the act which expressly declares that the Company shall be liable to pay their bonds in whosoever hands they may be, or by whatsoever means they may have been obtained. The Legislature never could have intended to say that if *A.* came to the East India House with bonds in his hand, and *B.* knocked him down and took them away, payment should be made to *B.*, and not to *A.*

The case, as represented on the Plaintiff's affidavits, is a case of fraud ; and that case has not yet been met. I do not wish to make that observation harshly with respect to Mrs. *Marshall*. Her conduct may be justifiable, but that justification remains to be given ; and the Court, in the mean time, can only act on the facts before it.

It appears that the Plaintiff and his wife chose to live separately. In October 1844, the lady died ; and the affidavits represent that Mrs. *Marshall*, who lived

in a separate house, came to the house where her mother had resided, and, without a shadow of legal right, possessed herself of all that had belonged to her mother, including a number of East India bonds. The Plaintiff, her father, took out administration to his wife, and then made an application to this Court, that his daughter might be restrained from parting with the bonds, and that the East India Company might be restrained from paying the monies secured by them to *Mrs. Marshall*, or to any other person than the Plaintiff. Nobody can doubt that the injunction, as it regards *Mrs. Marshall*, is right, for no other person than the Plaintiff can have any legal property in the bonds; and it appears to me, that it was the duty of the Court to interfere as against the East India Company also. With respect to an observation made by Counsel, that the Finance Committee of the East India Company are apprehensive that the value of East India bonds will be depreciated, if they can be affected by an injunction of this Court, I must say that, though the Finance Committee (which, no doubt, consists of gentlemen eminently competent in matters of finance) may think that the bonds are of more value because, in the event of their being stolen, the thief may receive the money instead of the lawful owner; yet there are other persons who may consider the bonds to be of greater value if, by the interference of this Court, the thief may be prevented from obtaining immediate payment of them, and the money due on them may be secured for the person to whom it properly belongs.

Injunction continued.*

* The Reporter was informed that the India Company presented an appeal to the House of Lords, from His Honor's decision; but, in consequence of the Plaintiff having dismissed his bill as against them, the appeal was dropped.

1845.
GLASSE
v.
MARSHALL.

1845:
23rd Nov.

*Decree.
Original and
Supplemental
Suit.*

After an order on further directions had been made, which contained a declaration as to the rights of the Plaintiff, he discovered that *A.* ought to have been made a party to the suit, and filed a supplemental bill to bring him before the Court. On the hearing of the supplemental suit, *A.* objected that the declaration was erroneous in law; but the Court said that the same declaration must be made in the supplemental as had been made in the original suit; for otherwise the record would be inconsistent with itself; and that *A.* must present a petition of rehearing.

JENKINS v. CROSS.

BY the order made on the hearing of *Jenkins v. Briant*, for further directions, (see *ante*, Vol. VI., p. 606,) certain persons, to whom the testator in the Cause had covenanted to pay annuities, were declared to be specialty creditors of the testator. When that order was made, the Defendant, *Cross*, was an incumbrancer on the shares of two of the devisees of the estates, but the Plaintiff, being ignorant of that circumstance, did not make him a party to the suit. He was afterwards brought before the Court by a supplemental bill. The supplemental suit was heard in 1843; and the decree then made directed the same accounts and inquiries to be taken and made as the decree on the hearing of *Jenkins v. Briant* had directed. The *Master's* report in the supplemental suit, was substantially the same as the report made in obedience to the decree in the original suit; and, on the hearing of the supplemental suit,

Mr. *Bethell* and Mr. *Campbell*, for the Plaintiff, asked for an order containing the same declaration, and similar, in every other respect, to the order on further directions in the original suit. But this was objected to by

Mr. *Stuart* and Mr. *Hallett*, for the Defendant *Cross*, on the ground that the declaration was erroneous in law.

Mr. *Wakefield*, Mr. *Anderson*, Mr. *Palmer*, and Mr. *Mackeson*, were the other counsel in the cause.

1845.

JENKINS

v.

CROSS.

The *Vice-Chancellor* said that the declaration might be wrong in point of law, but that he must make the same declaration in the supplemental as he had made in the original suit; for, otherwise, there would be two orders, inconsistent with each other, on the records of the Court; and that, if *Cross* wished to have the question, as to the propriety of the declaration, re-argued, he must petition for a rehearing of both the Causes.

DOUBTFIRE v. ELWORTHY*.

A PETITION in this Cause was amended by introducing into it statements of facts, all of which occurred after the original petition had been answered, and, some of them, even after the leave to amend was given.

1845:
6th Dec.

Amendment.
Petition.

The *Vice-Chancellor* held that the amendments were irregular, and dismissed the petition, with costs.

Facts occurred after a petition has been answered, cannot be introduced into it by amendment.

Mr. *Bethell* appeared in support of the Petition.

Mr. *Stuart*, contra.

* *Ex relatione.*

1845 :
12th Dec.

Appointment.
Power.
Will.
Attestation.

A will, in order to be a good exercise of a power, was required to be signed and published by the donee, in the presence of and attested by two or more credible witnesses. The donee made a will, which was signed by him and was attested thus : "We, the undersigned, attest to have seen the above testator sign the above will." Held that that clause was, in effect, an attestation to the publication as well as the signature of the will, and, consequently, that the power was well exercised.

BARTHOLOMEW v. HARRIS.

IN this case a will, in order to be a good appointment of a sum of stock, was required to be signed and published by the donee of the power, in the presence of and attested by two or more credible witnesses. The donee died in 1837, having made a will, which appeared, on the face of it, to have been signed by him, but did not, either in the body or at the conclusion of it, purport to have been published by him. The clause attesting his execution was signed by three witnesses, and was as follows :—"We, the undersigned, attest to have seen the above testator sign the above will."

The question was, whether that attestation was sufficient to make the will a good exercise of the power.

Mr. *Bethell*, Mr. *Goodeve*, and Mr. *Giffard* contended that the attestation was sufficient, on the authority of *Mackinley v. Sison* (a), where His Honor said : "I find no legal definition or explanation of the meaning of the term, 'publication;' and, therefore, if it appears that a testatrix has produced her will to witnesses, and has signed and sealed it in their presence, and they have attested that she has done so, I must take it that she has published the document in their presence."

Mr. *Walker* and Mr. *Collins* contended that the will was not a valid appointment, because the attestation, which was not general but special, expressed that only one of the two formalities prescribed by the donor had

(a) *Ante*, Vol. VIII. p. 561. See 568.

been complied with ; and, therefore, the Court, in a case where the will itself did not state that the other formality had been observed, was bound to conclude that it had been disregarded. *Burdett v. Spilsbury* (b), *Moodie v. Reid* (c), *Wright v. Wakeford* (d), *Doe v. Peach* (e), *Stankope v. Keir* (f), *Allen v. Bradshaw* (g), *Ward v. Swift* (h), *Curteis v. Kenrick* (i), *Buller v. Burt* (k), *Walters v. Metford* (l), *George v. Rielly* (m), *Waterman v. Smith* (n).

1845.

BARTHOLOMEW
v.
HARRIS.

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| (b) 10 Cl. & Fin. 340. | (g) 1 Curteis' Eccles. C. 110. |
| (c) 1 Madd. 516, 2 Madd. 156, and 7 Taunt. 355. | (h) 1 Crom. & Mee. 171. |
| (d) 4 Taunt. 213, and 17 Ves. 454. | (i) 3 Mee. & Wels. 461, and ante, Vol. IX. p. 443. |
| (e) 2 Mau. & Sel. 576. | (k) Cited, 4 Adol. & Ell. 15. |
| (f) 2 Sim. & Stu. 37. | (l) 2 Curteis, 221. |
| | (m) Ibid. 1. |

(n) *Ante*, Vol. IX. p. 629. In *Allen v. Bradshaw*, the power was required to be exercised by a will signed and published by the donee, in the presence of and to be attested by two or more credible witnesses. The attestation-clause to the paper propounded was in these words: "Witnesses to the signature of the said G. Allan." Sir Herbert Jenner held it insufficient. In *Walters v. Metford*, the will was required to be signed and published by the donee, in the presence of two witnesses. There was an attestation-clause to the paper propounded, though none was required. It ran thus: "Signed and sealed by the said H. N. Watson, in the presence of us, who, at her request and in her presence, have subscribed our names." The evidence given to prove the publication being insufficient, Sir H. Jenner pronounced against the paper. In *George v. Rielly*, the will was to be signed and published by the donee, in the presence of and to be attested by two or more witnesses. The paper propounded was signed and sealed, and was attested as follows: "Witnesses to the execution hereof." Sir H. Jenner held the attestation to be insufficient.

1845.

BARTHOLOMEW
v.
HARRIS.

The VICE-CHANCELLOR :

I remain impressed with the same opinion as I at first entertained with respect to this question.

A great many cases have been cited, but none of them tally with the present.

The question is whether it sufficiently appears, by the attestation, that the will was signed as well as published ? The words of the attestation-clause are :—"We, the undersigned, attest to have seen the above testator sign the above will." That appears to me to be, of itself, a sufficient testification, by the witnesses, that they saw the testator sign what they knew to be his will : in what words it was communicated, or by what acts made known, is utterly indifferent. As the attestation expresses that they saw him sign what they knew to be his will (no matter how they knew it), the attestation is sufficient.

Declare that the will was a good execution of the power.

SKRINE v. POWELL.

THE bill was filed for a discovery, and also to perpetuate the testimony of witnesses. The Defendant put in his answer, and, as well as the Plaintiff, examined witnesses in chief. After the return of the commission, he moved for his costs.

The *Vice-Chancellor* held that, notwithstanding he had examined witnesses in chief, he was entitled to the costs of the suit, *so far as it was a suit for discovery*.

Mr. *Cooper* and Mr. *Lewis* supported the motion.

Mr. *Rogers* opposed it.

The following authorities were referred to : *Anon.* (a), 2 *Fowler's Exch. Prac.* 296, 1 *Newland's Prac.* 398, and 1 *Smith's Prac.* 647, third edit.

(a) 8 Ves. 69.

1845 :
15th Dec.

Discovery.
Costs.
Practice.

A Defendant to a bill for discovery, and to perpetuate the testimony of witnesses, is entitled to his costs of the discovery, although he has examined witnesses in chief.

1845 :
18th Dec.

Legacy.
Will.
Construction.

Bequest of
8,000*l.* to tes-
tatrix's daught-
er, a married
lady, towards
purchasing a
country resi-
dence : Held
to be an abso-
lute bequest.

KNOX v. LORD HOTHAM.

A TESTATRIX, by a codicil, gave 8,000*l.* to her daughter, a married lady, towards purchasing a country residence.

The question was whether the trustees of the will were bound to see the 8,000*l.* invested in the purchase of a country residence for the daughter and her husband.

The VICE-CHANCELLOR :

In my opinion, it is an absolute gift to the daughter, and I shall so declare.

Mr. *Hodgson* and Mr. *Campbell* were the Counsel in the Cause.

1846 :
14th Jan.

Practice.
Service of Copy
Bill.

Where the time
for serving a De-
fendant with a
copy of the bill
has been en-
larged, it is not
necessary to
serve the Defendant with the order enlarging the time.

FENTON v. CLAYTON.

IN this case, the *Vice-Chancellor*, after consulting the other Judges of the Court, ruled that where an order has been obtained, *ex parte*, under the 28th General Order of May 1845, for extending the time for serving a Defendant with a copy of the bill, it is not necessary to serve a copy of that order together with the copy of the bill.

The point was submitted to the Court by Mr. *Glasse*.

PARKIN v. KNIGHT.

1846 :

17th Jan.

GEORGE PARKIN, by his will dated in 1827, gave all the residue and remainder of his property, which consisted of realty as well as personalty, in trust to his brother *Ephraim*, to assist him to bring up, educate, and provide for the children of the testator's late brother, *James*, namely, his nephews *George*, *Ephraim*, *Benjamin*, and *James*: "When my youngest nephew attains his age of twenty-one years, it is my will that all my property be equally divided amongst my nephews, *or their lawful issue*, share and share alike; the division, however, is not to take place, although my youngest nephew may have attained the age of twenty-one years, until the decease of my beloved wife, *Elizabeth Parkin*, of my sister *Elizabeth Parkin*, of my sister *Isabella Parkin*, and of my brother *Ephraim Parkin*. My will further is that my nephew, *George Parkin*, shall have my estate in *Ravenstonedale, Westmoreland*, exclusive of his other share, at the death of his mother *Sarah Parkin*."

The testator died in 1831. All the persons above named survived him. His nephew, *George*, was his heir. His nephew, *Ephraim*, died in 1833, an infant

division, however, is not to take place, although my youngest nephew have attained the age of twenty-one years, until the decease of my wife, my sister *J.*, and my brother *E.*" Held that the interests of the nephews were not contingent on their living until the youngest of them should attain twenty-one, but vested on the testator's death; and that the word, *or*, was to be construed conjunctively; and, consequently, that the nephews took estates-tail in their shares of the testator's real property, and absolute interests in their shares of his personal property.

Will.
Construction.
"Or" construed
"and."
Vested interest.

Testator gave in trust to his brother *E.* the remainder of his property, of whatsoever kind, to assist him to bring up, educate, and provide for the children of his late brother, *J.*, whom he named: "When my youngest nephew attains his age of twenty-one years, it is my will that all my property be equally divided amongst my nephews *or* their lawful issue, share and share alike; the

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PARKIN

v.

KNIGHT.

and unmarried. His sister, *Isabella*, survived his widow and his brother *Ephraim*, and died in 1843. In 1845, the youngest of his four nephews attained twenty-one, but none of them had issue.

The question was whether the three surviving nephews were entitled to the share of their brother, *Ephraim*, in consequence of his having died without issue before his youngest brother attained twenty-one, or whether his eldest brother, *George*, who was his heir as well as the heir of the testator, was entitled to so much of it as consisted of real estate, and his mother, who was his personal representative, to so much of it as consisted of personal estate.

Mr. *Stuart*, Mr. *Prescott White*, and Mr. *Simpson*, for the two youngest brothers, contended that the words: "all the residue and remainder of my property of whatsoever kind," were sufficient to vest the absolute legal interest in the testator's brother *Ephraim*, and that he took it clothed with a trust to educate and provide for the testator's nephews, until the youngest of them should attain twenty-one; that, on the happening of that event, but not before, each of the nephews who should be then living, would take a vested interest in one fourth of the property, and the issue of any nephew who should be then dead, would take a vested interest in another fourth, by way of substitution; but, if the deceased should have no issue then living, the whole of the property would vest in the surviving nephews, equally; or, in other words, that the interests of the nephews and of the issue of a deceased nephew, were contingent on their being alive at the time when the youngest nephew should attain twenty-one: but, though their shares were to vest in them at that time, the actual

division of the property amongst them, was to be postponed until the death of the testator's widow, his sister *Isabella*, and his brother *Ephraim*.

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v.
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The VICE-CHANCELLOR:

I cannot but think that the effect of a gift to *A.*, or his issue, is to give *A.* an estate-tail.

Mr. Lloyd, for *George Parkin*, the brother and heir-at-law of *Ephraim*, the deceased nephew of the testator, and *Mr. Koe*, for his mother and personal representative, contended that the nephews took absolute vested interests on the death of the testator; for the direction to divide the property amongst them, was equivalent to an immediate gift of it to them; and they were mentioned by their names, and not as a class; and that the postponement of the division affected not the vesting, but the actual enjoyment of their shares; and, consequently, that, on *Ephraim's* death without issue, his share of the real estate vested in his brother, *George*, as his heir, and his share of the personalty in his mother, as his personal representative: *Lane v. Goudge* (a), *Devisme v. Mello* (b), *Huxtep v. Brooman* (c), *Barker v. Lea* (d), and *Boraston's* case (e).

Mr. Rolt appeared for a formal party.

Mr. Stuart, in reply, said that the trust was to divide the property amongst the nephews *or* their issue, not amongst them *and* their issue; that that was an executory trust, and the parties to take under it were to

(a) 9 Ves. 225.

(d) Tur. & Russ. 413.

(b) 1 Bro. C. C. 537.

(e) 3 Rep. 19.

(c) Ibid. 437.

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be ascertained at the time when it was to be performed, and not before; and that then the issue of a deceased nephew were to take as purchasers, by way of substitution for their ancestor. He added, that there was no substitution in *Boraston's* case.

The VICE-CHANCELLOR:

In this case, the legal estate in fee in the testator's residuary real estate, was devised to his brother *Ephraim*; for the words: "the residue and remainder of my *property*," will carry the fee. It is clear, however, that the division of the property was not to be made by *Ephraim*; for the testator, in the subsequent part of his will, directs that, although his youngest nephew may have attained twenty-one, the division shall not take place until the death of his widow, his sister *Isabella*, and his brother *Ephraim*. The property is given in trust to *Ephraim*, to assist him to bring up, educate, and provide for the children of the testator's late brother, *James*, and therefore I cannot but think that *Ephraim* would take the property, subject to the right which the children would have to call upon him to assist in bringing up, educating, and providing for them. That right would last until the youngest of them should attain twenty-one. Then the testator says: "When my youngest nephew attains his age of twenty-one years, it is my will that all my property be equally divided amongst my nephews, or their lawful issue, share and share alike. Then follows the clause postponing the division until the death of the testator's widow, his sister *Isabella*, and his brother *Ephraim*. Such being the disposition which the testator has made of his property, I confess that I cannot see any substantial distinction between this and *Boraston's* case.

Amongst whom, then, was the property to be divided? —for it was to be divided, at any rate. The testator says: “amongst my nephews, or their lawful issue, share and share alike.” He does not say what is to be done in the event of any of his nephews dying without lawful issue. It is evident that this also might have happened; some of his nephews might have had issue, and others might not: but he does not say that the issue are to take the shares which their respective parents would have taken; and it would be strange to say that, when the youngest nephew attained twenty-one, the whole of the property was to be equally divided between the nephews and their issue, share and share alike. I cannot but think that the testator intended that his nephews alone should take his property, share and share alike; and I am confirmed in that opinion by the direction, that his nephew, *George*, shall have his estate in *Ravenstonedale*, *exclusive of his other share*. It is to be observed, also, that this is the will of a person unskilled in legal phraseology: and, taking all these matters into consideration, it seems to me that the best construction to be put upon his will, is to take the word ‘or,’ as used by him, conjunctively; that is, that the direction to divide his property amongst his nephews *or* their lawful issue, share and share alike, is to be held to be a direction to divide the property amongst his nephews *and* their lawful issue, share and share alike.

If that be so, the nephews took estates tail in their shares of the real estate, and absolute interests in their shares of the personalty; and as one of them, *Ephraim*, died without issue, his share is vested in his brother *George*, as the testator’s heir, and his share of the personal estate belongs to his personal representative.

1846.

PARKIN
v.
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1846 :
30th Jan.

ROLFE v. ROLFE.

Agreement.
Injunction.
Covenant.

If an agreement consists of two distinct parts, one of which the Court can enforce, but not the other, and a bill is filed, simply, for an injunction to restrain the violation of the former part, the Court will grant the injunction, notwithstanding it would not enforce the agreement *in toto*.

IN January 1833, *Francis, William, and James Rolfe*, tailors and co-partners, having agreed to dissolve their partnership, executed a deed whereby *William* and *James*, in consideration of 1000*l.* paid to each of them, assigned their shares of the business and stock in trade to *Francis*, (who was to carry on the business alone); and covenanted with him that they respectively would not, at any time thereafter, carry on, practise, or engage in the business of a tailor, either alone or with any other person, within twenty miles from the Standard on *Cornhill*. The deed further witnessed that *Francis*, in pursuance and performance of the agreement on his part, covenanted with *William* to employ him as a cutter in the business, so long as it should be carried on by him, and *William* should diligently and faithfully devote his time and attention to it, and to pay him a certain proportion of the profits of the business by way of salary.

After the dissolution of the partnership, the Plaintiff employed *William* as a cutter, at the stipulated salary, until shortly before the bill was filed; when *William* withdrew from his employment, and, as the bill alleged, commenced business as a tailor within the prohibited district, in co-partnership with one *Willis*.

The bill prayed, simply, for an injunction to restrain *William* from carrying on the business within the prohibited district, either alone or with any other person.

Mr. *Bethell* and Mr. *Terrell* now moved for the injunction.

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Mr. *James Parker* and Mr. *Giffard*, contra, said, that the Court could not enforce the agreement *in toto*; for it could not enforce that part of it which related to the employment of the Defendant as a cutter, and, therefore, it ought not to interfere at all: *Kemble v. Kean* (a), *Kimberley v. Jennings* (b). Secondly, that the Defendant, as appeared by the affidavits in opposition to the motion, was acting not as partner with, but as foreman to *Willis*, and that his acting in that capacity was not a breach of the agreement.

The *Vice-Chancellor* said that the bills in the cases cited, asked for the specific performance of the agreement; and that the injunctions were sought as only ancillary to that relief; but, the bill in the present case, asked merely for the injunction. Besides which, the agreement consisted of two distinct parts; one, which was entered into by *William*, not to carry on the business of a tailor within a certain distance from the Standard on *Cornhill*, and the other, which was entered into by *Francis*, to employ *William* as a cutter, and to pay him a certain per-centage on the profits of the business so long as it should be carried on by him, and *William* should conduct himself diligently and faithfully: that the Court certainly would not enforce the latter part of the agreement; not only on account of the nature of it, but because *Francis* might put an end to it, whenever he pleased, by ceasing to carry on the business; but nothing was asked as to that part, and only an injunction was asked as to the other part which the Court could enforce.

(a) *Ante*, Vol. VI. p. 333.

(b) *Ibid.* 340.

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ROLFE.

In answer to the objection that *William* had not broken the agreement, because he was acting merely as a foreman, and not as a principal, in the business of a tailor, His *Honor* said that the words of the agreement were that *William* should not, at any time thereafter, carry on, practise, or engage in that business, alone or with any other person or persons; and that, as he had engaged with *Willis* in carrying on the business, he had plainly violated the agreement (c).

Injunction granted.

Reg. Lib. B. 1845, fo. 318.

(c) See *Hooper v. Brodrick*, ante, Vol. XI. p. 47.

1846:

12th Feb.

Pleading.
Discovery.

The Plaintiff
claimed an es-
tate which was

in the Defendant's possession, and prayed for an account and payment of the rents received by the Defendant, and for a discovery of all the documents in the Defendant's possession relating to the matters contained in the bill. The Defendant pleaded the instrument under which he claimed, to all the relief and to so much of the discovery as related to the rents, and answered to the matters which his plea did not purport to cover, and set forth a list of all the documents in his possession relating to the matters in the bill, except such of them as related to the rents.

Held that the Plaintiff was entitled to a discovery of those documents also.

RIGBY v. RIGBY.

THE Plaintiff and the Defendant were first cousins, and nephews to the testator in the Cause, and both of them were named *John Rigby*. The testator had devised an estate to a trustee, in trust for his nephew *John Rigby*,

and, under that devise, the Defendant was in the receipt of the rents of the estate.

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v.

RIGBY.

The Plaintiff, by his bill, sought to obtain possession of the estate and an account and payment of the rents received by the Defendant, alleging that he was the person intended by the testator, and stating several circumstances in support of that allegation.

The Defendant put in a plea and answer to the bill. The plea stated the will, and that the Defendant was the person whom the testator intended to take the estate. It extended to all the relief sought by the bill, but was confined to so much of the discovery as related to the rents received by the Defendant. To the answer was annexed a schedule, containing, as the Defendant averred, a list of all the documents in his possession or power of which a discovery was sought by the bill, except those that related *exclusively* to the rents received by him.

Mr. *James Parker* and Mr. *R. Palmer*, in support of the plea, contended that it was good both in substance and in form, for it reduced the matter in dispute between the parties to a single issue, and the answer contained every thing that was material to support the plea: that the bill consisted of two distinct parts, one relating to the Plaintiff's pretended title to the estate, as to which the Defendant had answered as he was bound to do, and the other, relating to matters consequential to that part which the Defendant had covered by his plea, and, therefore, had refused to give any discovery with respect to it.

Mr. *Robson*, in support of the bill, said that the Defendant ought to have included, in his schedule, the

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documents in his possession relating to the rents of the estate, as they might, incidentally, mention matters tending to make out the Plaintiff's claim.

The VICE-CHANCELLOR :

A deed may relate exclusively to the rents of the estate, and yet contain either recitals or descriptions of parties tending to show that the Plaintiff is entitled to the estate.

Mr. *R. Palmer*.—Such a deed would relate to other matters than the rents ; and therefore would not be within the protection which we claim.

The VICE-CHANCELLOR :

The bill alleges that the Plaintiff is entitled to the estate. The plea avers that the Defendant is entitled to it. But the fact that the Defendant is entitled, is no reason why the Plaintiff should not have a discovery of the documents relating to the rents of the estate.

Plea overruled.

DAVIS v. CHANTER.

IN consequence of the Court having allowed the objection that *Ann Chanter* was not properly represented by the limited letters of administration that had been taken out to her *, the Plaintiffs, with a view to obtaining general letters of administration to her and making the general administrator a party to the suit, obtained an order, on the 5th of July, 1844, for liberty to amend by adding parties; and, afterwards, made an application for such letters of administration to the Ecclesiastical Court, but without success. They then obtained an order, *ex parte*, for setting down the Cause again for hearing; and it now came on to be heard a second time, without the order for leave to amend having been discharged, or the circumstances which had disabled the Plaintiffs from availing themselves of it, stated on the record.

Mr. *Bethell* and Mr. *Willcock*, for the Defendants, said that the order to amend was a judicial decision that the Cause was not in a fit state to be heard; that it still remained in force, and nothing appeared on the record to account for its not having been acted upon, and therefore the hearing of the Cause could not be proceeded with.

Mr. *Cooper*, Mr. *Lovat*, and Mr. *Walpole*, for the Plaintiffs, stated the reasons why the order had not been acted upon, and added that, as it gave the Plaintiffs only *liberty* to amend, they were entitled to dis-

1846:
13th, 14th, and
16th Feb.

*Order to amend
Hearing of
Cause.
Amendment.*

An objection for want of parties having been allowed at the hearing, the Plaintiffs obtained an order for leave to amend by adding parties. They did not, however, amend, but again brought on the cause for hearing, without having discharged the order, or stated on the record why they had not acted upon it.

The Court refused to proceed with the hearing.

* See *ante*, Vol. XIV. p. 212.

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 —————
 DAVIS
 v.
 CHANTER.

regard it, if they thought proper so to do: *Greenwood v. Atkinson (a)*, *Wood v. Wood (b)*, *Biedermann v. Seymour (c)*.

Mr. *Stuart*, Mr. *Koe*, Mr. *James Parker*, Mr. *Bagshawe*, Mr. *Campbell*, and Mr. *Shapter*, appeared for other parties.

The VICE-CHANCELLOR:

The order of July 1844, is still a subsisting and binding order; and, as there has been no dealing with the record, either by amendment or by supplemental bill, the suit remains in precisely the same state as it was in when it was first brought on for hearing. I then held it to be defective, and it still remains so. That is quite a sufficient reason why I should not further proceed with the hearing. The order of the 5th of July 1844, binds me on the 16th of February 1846.

(a) *Ante*, Vol. V. p. 419.

(b) 3 You. & Coll., Ex. C., 580.

(c) 2 Myl. & Cr. 117.

The proceedings on the application to the Ecclesiastical Court for the general letters of administration, are reported in 1 *Robertson's Ecclesiastical Cases*, 273.

On the embarrassment caused by the refusal of the Ecclesiastical Court to grant the general letters of administration, being brought, by Mr. *Cooper*, to the notice of the *Lord Chancellor*, his Lordship said that he would confer with the Judge of that Court on the subject.

SEARLE v. LAW.

BY a deed dated in 1836, *Alexander Law* the elder, since deceased, made a voluntary assignment of a sum of money due to him on the security of the tolls of a turnpike-road, and some shares in an insurance and in a banking company, to the Plaintiff, in trust for himself for life, and, after his decease and in default of any appointment by him, in trust for his nephew *Alexander Law* the younger; and appointed the Plaintiff his attorney to receive the monies due and to become due in respect of the assigned premises.

The turnpike-road securities and the shares were delivered to the Plaintiff, by the direction of *Alexander Law* the elder; but the shares remained in his name, and nothing was done with respect either to them or to the turnpike-road securities, to make the assignment effectual.

The bill was filed against *Alexander Law* the younger and the executor of his uncle, in order to have the rights of the Defendants to the securities and shares ascertained and declared by the Court.

By the decree at the hearing of the Cause, the *Master* was directed to inquire and state whether, by the constitution of the insurance and banking companies, any and what formalities were required for the purpose of effecting a transfer of shares in those companies.

The *Master* found that the insurance company was constituted by a deed of settlement, by which it was

1846 :
23rd & 24th
Feb.

*Voluntary
Assignment.*

A. made a voluntary assignment of turnpike bonds and shares in companies, to *B.*, in trust for himself for life, and after his death, for his nephew. He delivered the bonds and shares to *B.*, but did not observe the formalities required, by the Turnpike-road Act and the deeds by which the companies were formed, to make the assignment effectual.

Held, on his death, that no interest, in either the bonds or the shares, passed by the assignment, and that *B.* ought to deliver them to his executors.

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SEARLE

v.

LAW.

declared that every person desirous of selling his shares in the company, should give notice of such desire, in writing, at the office of the company, and should describe in such notice the number of shares to be sold and the persons desirous of purchasing them; that, after the court of directors should have certified that the person desirous of purchasing the shares and thereby becoming a proprietor in the company, was fit to be a proprietor, then the person desirous of selling might be at liberty to transfer his shares; that such transfer should be made at the office of the company, by an instrument in writing to be prepared by the court of directors; and that the purchaser should, within two months afterwards, execute the transfer, which was also to be signed by three of the directors; and that, thereupon, and not before, the transfer was complete. And the *Master* found that the before-mentioned formalities were necessary, according to the constitution of the company, for effecting a transfer of shares *on a sale* by a proprietor; but he did not find that any formalities were necessary for effecting a transfer of shares by way of voluntary settlement or assignment in trust, without pecuniary consideration. The *Master* next stated that the banking company also was constituted by a deed of settlement; and he set forth the clauses of it, which contained the form of the deed and the other formalities required on a transfer of shares in that company on a sale by a proprietor; but he did not find that any formalities were required for effecting a transfer of such shares by way of voluntary settlement or assignment in trust, without pecuniary consideration, except that notice in writing of the assignment was necessary to be given at the company's office, accompanied by a requisition that the assignee might be registered, in the books of the company, as a proprietor of the shares mentioned in the

assignment; and that, on the company approving of the requisition and the assignee executing a certain deed of covenant with two of the directors, he would be registered as a proprietor.

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SEARLE
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LAW.

With respect to the turnpike-road securities, it appeared that, by 3 Geo. 4, c. 126, (for amending the general laws then in being, for regulating turnpike-roads in *England*), sect. 81, a transfer of them was to be made in the words mentioned in the Act, or words to the like effect, and to be endorsed or written under, or annexed to the securities, and signed in the presence of and attested by one or more credible witnesses; and the transfer was to be produced and notified to the clerk or treasurer of the trustees or commissioners of the road, within two calendar months next after the date thereof, who was to enter the same in a book or books to be kept for that purpose, and such transfer was *then to entitle* the assignee to the full benefit of the securities.

At the hearing of the Cause for further directions,

Mr. *Bethell* and Mr. *Wright*, for the Plaintiff, said that their client submitted to dispose of the securities and shares as the Court should direct.

Mr. *Stuart* and Mr. *Follett*, for *Alexander Law* the younger, said that the assignment made by *Alexander Law* the elder, was sufficient, of itself, to vest the shares in the insurance company in the Plaintiff; for the *Master* had found that no formalities were required for effecting a transfer of such shares on a voluntary assignment. [The *Vice-Chancellor*: The question is whether, according to the true construction of the deed by which that company is constituted, the voluntary assignor

1846.

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LAW.

could make an effectual transfer, without the sanction and approbation of the company? Does not the word, 'seller,' in that deed, mean, 'assignor?' The deed seems to suggest, although the *Master* has not so found, that no transfer can be made if the directors of the company object to it. Besides, there is this difficulty: I am asked, in a suit to which neither the insurance nor the banking company are parties, to determine whether the Plaintiff is or is not a shareholder with them.] The question here is between the *cestui que trust* under the assignment, and the executor of the settlor; and the point for the Court to determine is whether the Plaintiff has not such a title in him as enables him to hold the property as against the executor. [The *Vice-Chancellor*: I see, on reading the bill, that the Plaintiff treats himself as a trustee, but the question is whether he has become a trustee in the sense of having the property vested in him.] With respect to the shares in the Bank, nothing is required to be done, except to give the notice and make the requisition mentioned by the *Master*; and that can be done at any time: *Fortescue v. Barnet* (a), *Sloane v. Cadogan* (b), *Bill v. Cureton* (c), *Antrobus v. Smith* (d), *Ex parte Pye* (e).

Mr. *Anderdon* and Mr. *Shapter*, for the executors of *Alexander Law* the elder, said that, in order to render a voluntary assignment effectual in favour of the parties intended to be benefited by it, every thing must be done, in the lifetime of the assignor, to vest the

(a) 3 Myl. & Keen, 36.

(b) 3 Sugd. Vend., Appendix.

(c) 2 Myl. & Keen, 503.

(d) 12 Ves. 39.

(e) 18 Ves. 140.

property in the assignee; and there must also be a valid declaration of trust: but, in the present case, there was neither a complete assignment nor a valid declaration of trust as to any part of the property; for none of the formalities required for effectually transferring either the turnpike-road securities or the shares in the companies, had been observed; and there was no valid declaration of trust, for an invalid assignment could not be a valid declaration of trust; and, consequently, the property in dispute must be declared to be part of the assets of *Alexander Law* the elder: *Ward v. Audland* (*f*), *Dillon v. Coppin* (*g*), *Jefferys v. Jefferys* (*h*), *Malcolm v. Scott* (*i*), *Walburn v. Ingilby* (*k*), *Beatson v. Beatson* (*l*), and *Edwards v. Jones* (*m*).

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v.
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THE VICE-CHANCELLOR:

I do not understand that there is any property vested in the Plaintiff, with respect to which I can make any decree. I mean to be understood as speaking of the turnpike bonds, the shares in the Bank, and those in the insurance company. It is perfectly plain, from what appears on the *Master's* report with regard to the shares, and on the Act of Parliament with regard to the turnpike bonds, that no interest in them passed to the Plaintiff; and, consequently, he is merely the holder of documents that belong to the personal representative of *Alexander Law* the elder. If that gentleman had not attempted to make any assignment of either the bonds or the shares, but had simply declared, in writ-

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|---|---|
| (<i>f</i>) <i>Ante</i> , Vol. VIII., p. 571; 8 Beav. 201. | (<i>i</i>) 3 Hare, 39. |
| (<i>g</i>) 4 Myl. & Cr. 647. | (<i>k</i>) 1 Myl. & Keen, 61. |
| (<i>h</i>) Cr. & Phill. 138. | (<i>l</i>) <i>Ante</i> , Vol. XII., p. 281. |
| | (<i>m</i>) 1 Myl. & Cr. 226. |

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ing, that he would hold them upon the same trusts as are expressed in the deed, that declaration would have been binding upon him; and whatever bound him would have bound his personal representative. But it is evident that he had no intention whatever of being himself a trustee for any one; and that he meant all the persons named in the deed as *cestuis que trust*, to take the provisions intended for them through the operation of that deed. He omitted, however, to take the proper steps to make that deed an effectual assignment, and therefore both the legal and the beneficial interest in the bonds and shares remained vested in him at his death.

Declare that no interest, either in the bonds or in the shares, passed to the Plaintiff, and that the same are not affected by any declaration of trust, and that he ought to deliver over the documents in his hands to the personal representative of *Alexander Law* the settlor.

CHAMPION v. CHAMPION.

THE Plaintiffs and the Defendants, *Guy Champion* and *W. H. Wright*, had been co-partners as vinegar makers. On the 31st of December 1839, they dissolved their co-partnership, and, by a deed dated the 14th of January 1840, they assigned all the property of it to the Defendant *Thomas Champion*, their largest creditor, in trust, after retaining his own debt and paying the debts of their other creditors, to divide the surplus (if any) amongst them according to their shares in the gains and profits of the business. *Thomas Champion* was the principal Defendant: indeed the only question in the suit was between him and the Plaintiffs. It related to the price which he was to pay for some vinegar, part of the property of the late co-partnership: and *Guy Champion* and *Wright* were charged by the bill as acting in concert and collusion with him.

The Plaintiffs had examined *Guy Champion* as a witness in the Cause; and, at the hearing Mr. *Bethell* and Mr. *Hardy*, who appeared for *Thomas Champion*, said that, on that account, the Court would make no decree, and the bill must be dismissed: *Bernal v. The Marquis of Donegal* (a), *Lautour v. Holcombe* (b), *Nightingale v. Dodd* (c), *Carter v. Hawley* (d), *Thompson v. Harrison* (e), and *Hulton v. Sandys* (f).

Mr. *James Parker*, with whom was Mr. *Hubback*,

1846:
23rd & 24th
Feb.

*Examination of
a Defendant as
a Witness.*

A. filed a bill against *B.* and *C.*—*B.* was the principal Defendant, and the only question in the Cause was between *A.* and him. But the Court could not make a complete decree without an account being taken as between *A.* and *C.*; and, as *A.* had examined *C.* as a witness in the Cause, the Court held that no decree could be made in the suit, and dismissed the bill; but without prejudice to the filing of a new one.

(a) 3 Dow, 133.

(b) *Ante*, Vol. VIII., p. 76.

(c) Amb. 583.

(d) Ibid, note.

(e) 1 Cox, 344.

(f) 1 Youn. 602.

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for the Plaintiffs, said he did not ask for any relief whatever as against *Guy Champion*.

Mr. *Stuart*, Mr. *Randell*, and Mr. *J. Baily*, appeared for the other parties.

The VICE-CHANCELLOR :

I do not think it necessary for me to express any opinion as to the principal question in the Cause; because the course which the Plaintiffs have pursued has made it impossible for me to grant the decree as they ask it.

The bill is filed, in effect, to have a performance, by *Thomas Champion*, of the trusts created by the deed of January 1840; and, if that had been all, the case would have been a very simple one: for *Thomas Champion* would have had nothing more to do than to make out an account of what, upon the foundation of the deed, ought to be taken to be the real value of the vinegar which was part of the stock in trade of the late co-partnership.

But observe what he was required to do by the deed. In the first place, he was to pay, out of the amount at which the stock and debts due to the late partnership should be valued to him, all the debts and engagements of, and due and owing from the partnership on the 31st of December 1839, and he was to retain thereout his own debts; and then he was to pay, out of the residue, the sums appearing, by the partnership books, to be due to each of the late co-partners, on the 31st of December 1839, and lastly, he was to pay and divide whatever balance might remain, unto and between the late co-partners, according to their several

and respective interests in the gains and profits of the concern. Now, how is that to be done without first taking an account of all the dealings and transactions of the partnership between the Plaintiffs and *Guy Champion* and *Wright*? How can the amount to be paid to each of them be ascertained without taking that account? It is perfectly plain, according to the constitution of the deed, that *Thomas Champion* is not to be called into Court twice: once, to have established against him what is the price that he ought to pay for the vinegar, and again, in order that he may apportion, out of the ascertained fund for which he shall have been declared liable, the different parts to which the Plaintiffs and their two former co-partners may be found to be entitled. Therefore, the decree must, of necessity, be an adverse decree for the purpose of ascertaining, as between the Plaintiffs and *Guy Champion*, what is the amount of the share coming to *Guy Champion*.

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I have not been able to divest myself of that opinion from the time when the objection was first made. I have since had an opportunity of considering what are the obligations imposed, by the deed, on *Thomas Champion* with regard to the amount to be paid for the vinegar, and with regard to the sum to be paid by him when that amount has been ascertained. He is to do something with the sum due from him, when the amount of it has been ascertained. But the Plaintiffs, by the course which they have taken, have disabled themselves from having any account taken between themselves and *Guy Champion*; and, consequently, they cannot have that relief which, but for taking that course, they would have been entitled to.

Nothing can be more explicit than the language

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of Lord *Eldon* in *Bernal v. The Marquis of Donegal*. His Lordship says : "There is nothing better established than this, that if they choose to examine a Defendant as a witness, they cannot have any decree against him."

What reason the Plaintiffs had for examining *Guy Champion*, I cannot discover ; but, whatever that reason may have been, my opinion is that this bill cannot be maintained.

Bill dismissed with costs ; but without prejudice to the Plaintiffs filing a new bill.

1846:
 25th Feb.
 Plaintiff.
 Costs.
 Practice.

PLAYER v. ANDERSON.

A Plaintiff, whose residence was correctly stated in the bill, ordered to give security for costs, because he had frequently changed his place of abode since the bill was filed.

MR. *Stuart* and Mr. *Stratton*, for the Defendant, moved that the Plaintiff might be ordered to give security for the costs of the suit, on the ground that he had no permanent place of residence.

The Plaintiff was described in the bill as of *No. 13, Bury-street, St. James's*, which, at that time, was his real place of residence ; but he merely lodged there, and removed from thence about a fortnight afterwards. He then went to *Paris*, next to *Carlisle*, and subsequently to *Bath*, where, it was said, he was still residing with his relatives.

The cases cited in support of the motion were *Weeks v. Cole* (a), *Sandys v. Long* (b), and *Calvert v. Day* (c).

- (a) 14 Ves. 518. (b) 2 Myl. & Keen, 487.
 (c) 2 Youn. & Coll. Eq. Ex. 217.

Mr. *Bethell*, *contra*, said there was no misdescription of the Plaintiff in the bill ; for he was residing in *Bury-street* at the time when the bill was filed ; that he afterwards went to *Paris*, but for only a temporary purpose ; and that he was now resident with his relatives at *Bath* ; and that there was no instance in which a Defendant had been ordered to give security for costs, merely because he had not resided in the same place from the commencement to the end of the suit.

1846.
 —————
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The VICE-CHANCELLOR :

It is true that there is no misdescription of the Plaintiff in the bill. But, though it gives a description of him which was correct at the time, it gives no useful information to the Defendant. For it appears, from the affidavits, that the Plaintiff has since frequently changed his place of residence ; and therefore you cannot infer that he will remain long in any situation. So that the case falls within the principle of *Calvert v. Day*, and I shall make the order.

1846 :
3rd, 4th, & 5th
March.

*Devisee and next
of Kin.
Merger.
Incumbrances.
Charges.*

A., on her father's death, became seised of real estates as his heir, and entitled under his marriage settlement to a sum which the trustees of the settlement had lent him on mortgage of the estates.

The testatrix, by a deed executed shortly before her will, charged the estates and the sum secured on them with an annuity, and otherwise showed that she intended the mortgage to be kept on foot, for the purpose, at least, of securing the annuity. By her will she devised the estates, after the payment of her own debts, and *after her father's affairs should have been settled*, to B., and died intestate as to her residuary personal estate. Held that, as against *her next of kin*, the incumbrance created on the estate, by her father, must be considered to have merged in it.

SWABEY v. SWABEY.

BY an indenture dated the 12th of June 1815, *Thomas Lynch Goleborn*, in consideration of 600*l.*, granted an annuity or rent-charge of 60*l.* a year, out of a house numbered one in *Bedford-square, Brighton*, to *Henry William Cole*, during the lives of the grantee and certain other persons, and the lives and life of the survivors or survivor of them, and appointed the house to *John Cooper* for two hundred years, upon certain trusts for better securing the annuity. By an indenture dated the 16th of December 1841, *Cole* assigned the annuity to *Thomas Evans*.

By an indenture dated the 25th of March 1823 and made between *T. L. Goleborn* and *Catherine* his wife of the first part, their daughter, *Catherine Goleborn*, who was the testatrix in the Cause, of the second part, and *Maurice Swabey* and *T. H. Mortimer* of the third part, *T. L. Goleborn* made an appointment, by way of mortgage, of the before-mentioned house and two others adjoining it, to *Maurice Swabey* and *Mortimer* in fee, for securing the re-transfer of 2,328*l.* 17*s.* 10*d.* Consols into their names upon the trusts of his marriage settlement, and the payment to them, in the meantime, of the amount of the dividends of that sum.

By an indenture dated the 18th of February 1829, and made between the same parties as the preceding one, *T. L. Goleborn* made a further charge upon the three houses for securing the re-transfer of 2,735 *l.* 18*s.* Reduced Annuities into the names of *Maurice Swabey* and *Mortimer* upon the trusts of the settlement, and the payment to them, in the meantime, of the amount of the dividends to become due on that sum.

1846.
—
SWABEY
v.
SWABEY.

By an indenture dated the 29th of May 1829, *T. L. Goleborn* granted an annuity or rent-charge of 70 *l.* a year, out of the three houses, to *W. T. Luxmoore*, during the lives of the grantee and certain other persons, and the lives and life of the survivors and survivor of them, and appointed the houses to *R. N. Canning* for ninety-nine years, upon certain trusts for better securing that annuity.

By another indenture dated the 16th of December 1841, and made between *Catherine Goleborn*, the testatrix, of the first part, *Thomas Evans* of the second part, and *Thomas Clarke* of the third part; after reciting that the two sums of stock belonged to *Maurice Swabey* and *Mortimer* as the trustees of Mr. and Mrs. *Goleborn*'s marriage settlement, by which the same were settled in trust, after their deaths, for the issue of their marriage absolutely; and that Mr. *Goleborn* died on the 7th of January 1837*, without having re-transferred the sums of stock, and that he left, his widow, *Catherine Goleborn* and the testatrix, his only child; and that his widow had since died, whereupon the testatrix became absolutely entitled, under the trusts of the settlement,

* He died intestate and insolvent, and the testatrix was his heir, though the deed did not so recite.

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to the two sums of stock, for her own use and benefit, *and to the securities for the same* comprised in the indentures of the 25th of March 1823 and the 18th of February 1829; she, for the considerations in the now-stating indenture mentioned, granted to *Thomas Evans* an annuity of 60 l. for his life, to commence from the day of the death of *H. L. Cole*, in case *Evans* should be then living; and she granted and released, and also assigned and transferred the houses *and the two sums of stock lent and advanced on the security of them, or so much of the same sums as then remained due*, to *T. Clarke*, his heirs, executors, &c., upon certain trusts for securing the payment of the annuity thereby granted, and, subject thereto, upon trust *for herself*, her heirs, *executors, administrators*, and assigns; and the indenture contained a proviso that, in case the heirs, executors, or administrators of her father should, at any time thereafter, repurchase the annuity granted by the indenture of the 12th of June 1815, in pursuance of the power given by such indenture for that purpose, and the same annuity should thereby cease and determine, the annuity granted by the now-stating indenture should also cease and determine.

The testatrix died on the 28th of March 1843, having made her will, dated the 21st of February 1842, which was, in part, as follows: "I appoint *Maurice C. M. Swabey* to be my sole executor; and I charge him to fulfil the intention of this my will. I charge my freehold property, numbers 1, 2, and 3, in *Bedford-square, Brighton, Sussex*, with the yearly sum of 80 l., to be paid to my faithful servant *Thomas Evans*. I wish my just debts and funeral expenses to be paid. My annuity from *Henry B. Swabey, Esq.*, and the residue of the rents of numbers 1, 2, and 3, *Bedford-square*,

Brighton, Sussex, after the annuities upon those houses have been paid, *I wish to be applied in the settlement of the affairs of my late dear father.* If *Henry B. Swabey*, esq., should think proper to redeem the annuity of 480*l.* by the payment of 4,120*l.*, then I wish the 4,120*l.* to be invested in the Three-and-a-half per Cents., and the dividends to be applied to the settlement of my late father's affairs: and if my three houses at *Brighton* should happen to be untenanted, or, from any other cause, should not produce the annuity of 80*l.*, then I wish my executor to make up the full sum of 80*l.* *per annum*, or to pay the whole of it to *Thomas Evans* out of my annuity of 480*l.* from *Henry B. Swabey*. *After the affairs of my dear father shall have been settled*, my own just debts, funeral expenses and other legacies having been first discharged, I leave to my godson, *Henry Swabey*, my three houses at *Brighton*, my annuity of 480*l.* from *Henry B. Swabey*, my plate, linen, books, wine, china, and furniture." The testatrix then left one year's wages to all her servants, and legacies of 20*l.* each to certain other persons.

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By the decree made at the hearing of the Cause in July 1843, the *Master* was directed to take an account of the testatrix's personal estate come to the hands of her executors, distinguishing the personal estate specifically bequeathed from the personal estate not specifically bequeathed; and also to take an account of her debts, funeral, and testamentary expenses, legacies, and annuities, and to inquire and state whether any part of her personal estate was outstanding or undisposed of: and it was ordered that her personal estate not specifically bequeathed, should be applied in payment of her debts and funeral expenses, and then of the legacies and annuities given by her will: and the *Master* was directed

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to inquire and state what real estates she was seised, possessed of, or entitled unto at her death; and whether any and what charges or incumbrances were made by her or her father, or by any other person or persons on those estates; and whether any of her father's debts still remained due and recoverable: and, if the *Master* should find that there were any of such last-mentioned debts, then he was to take an account of them, and to compute interest on such of them as carried interest.

On the 19th of May 1845, the *Master* reported that, including 4,120*l.*, which had been paid by *H. B. Swabey*, for the repurchase of the annuity of 480*l.*, the executor had received, on account of the testatrix's personal estate specifically bequeathed, sums amounting to 5,496*l.* 5*s.* 2*d.*; that, including the investment by him of the 4,120*l.* in Consols, he had expended, on account of the personal estate specifically bequeathed, sums amounting to 4,128*l.* 2*s.*, which being deducted from the 5,496*l.* 5*s.* 2*d.*, left a balance of 1,368*l.* 3*s.* 2*d.* due from him in respect of the personal estate specifically bequeathed; that no sum had come to his hands in respect of the personal estate not specifically bequeathed, but that he had paid, on account thereof, sums amounting to 1,252*l.* 18*s.* 3*d.* The *Master* further found 248*l.* 15*s.* to be due to *T. Evans*, in respect of the annuity of 60*l.* granted by the indenture of the 12th of June 1815; and that, if *Evans* should survive *H. L. Cole*, he would become entitled, under the second indenture of the 16th of December 1841, to another annuity of 60*l.*, to commence from *Cole's* death: that 163*l.* 5*s.* 11*d.* was due to *Luxmoore* in respect of the annuity granted to him by the indenture of the 29th of May 1829: that the testatrix's funeral and testamentary expenses had been paid by her executor: that none of the legacies

given by her will, nor the arrears of the annuity thereby given to *Thomas Evans*, had been paid, and that 297 *l.* 13 *s.* 3 *d.* was due in respect of those legacies and arrears.

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—
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With respect to *the testatrix's personal estate outstanding and undisposed of*, the *Master* found that it consisted of *the two sums of 2,328 *l.* 17 *s.* 10 *d.* Consols and 2,735 *l.* 18 *s.* Reduced*, charged on the *Brighton* houses by the indentures of the 25th of March 1823 and the 18th of February 1829, and of 4,130 *l.* 6 *s.* 6 *d.* Consols standing in the name of her executor, which he had purchased with the sum paid for the repurchase of the annuity of 480 *l.*

With respect to the testatrix's real estates, the *Master* found that *she was seised in fee* of the three houses before-mentioned*; and that her executor had received 377 *l.* 17 *s.* 9 *d.* on account of the rents of them accrued since her death.

The *Master* next set forth the contents of the indentures of the 12th of June 1815, the 25th of March 1823, the 18th of February 1829, the 29th of May 1829, and the 16th of December 1841, as they are hereinbefore stated, and found that the testatrix's father had charged and incumbered the house numbered one with the annuity of 60 *l.* to *Cole*, which had been assigned to *Evans*, and that and the other two houses, with the repayment of the 2,328 *l.* 17 *s.* 10 *d.* Consols and 2,735 *l.* 18 *s.* Reduced, lent and advanced to him *and still due and owing*,

* How the testatrix became seised of the houses did not appear on this report; but see the next page.

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and also with the annuity to *Luxmoore*; and that, by the second indenture of the 16th of December 1841, the testatrix *had charged and incumbered* the three houses *and also the two last-mentioned sums of stock and the securities for the same*, to which she became absolutely entitled as thereinbefore mentioned, with the annuity of 60 *l.* to *Evans*, to commence on *Cole's* death.

With respect to the debts of the testatrix's father the *Master* found that a sum of 1,616 *l.* 4 *s.* 7 *d.* due to *H. Clarke* in respect of certain bill transactions between him and the testatrix's father, was the only debt due and recoverable at the date of the decree.

The annuity granted to *Cole* and assigned to *Evans*, and the annuity granted to *Luxmoore*, being redeemable on certain terms, the Plaintiff, on the 3rd of June 1845, petitioned for and obtained an order, by which the *Master* was directed to inquire and state whether it would be fit and proper and for the benefit of the parties interested in the estate of the testatrix, that those annuities should be repurchased.

The *Master* reported in the affirmative. In his report he stated that, by indentures of lease and release dated the 21st and 23rd of December 1839, and endorsed on the indenture of the 25th of March 1823, and made between *Maurice Swabey* and *Mortimer* of the one part, and the testatrix of the other part, after reciting the death of the testatrix's father without having retransferred either the 2,328 *l.* 17 *s.* 10 *d.* Consols or the 2,735 *l.* 18 *s.* Reduced, into the names of *Maurice Swabey* and *Mortimer*, and that he left his wife and the testatrix, his only child, him surviving, and that his wife had since

died, whereupon the testatrix became *absolutely entitled to the two last-mentioned sums of stock*, for her own use and benefit: *Maurice Swabey and Mortimer*, for a nominal consideration, conveyed the three houses at *Brighton* unto and to the use of the testatrix, her heirs and assigns; *but subject to such equity of redemption as the houses were then subject to by virtue of the indenture of the 25th of March 1823, and the indenture of the 18th of February 1829.*

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The *Master* next set forth the deed of the 16th of December 1841, by which the testatrix granted to *Evans* the annuity of 60 *l.*, to commence on *Cole's* death. It then appeared that that deed recited that *Evans* had purchased *Cole's* annuity at the testatrix's request and in consideration of her having agreed to grant to him the annuity thereby granted; and that, for some time past, *she had been in receipt of the rents of the houses, as such mortgagee as aforesaid*, and had paid, out of such part as had arisen from the house numbered one, the annuity of 60 *l.* granted by the indenture of the 12th of June 1815.

On the 23rd of June 1845, the last-mentioned report was confirmed, and *M. C. M. Swabey*, the executor of the testatrix, was ordered to re-purchase the two annuities mentioned in the order of the 3rd of June, out of the 4,130 *l.* 6 *s.* 6 *d.* Consols standing in his name, that being the fund which the *Master*, in obedience to the order, had certified that it would be fit and proper and beneficial to the parties interested in the testatrix's estate, to apply for that purpose.

The Cause now came on to be heard for further directions.

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Mr. *Stuart* and Mr. *G. L. Russell*, for the Plaintiff, said that the testatrix had not made any disposition of her residuary estate; and, therefore, her next of kin had been made Defendants to the suit; and it would be contended, for them, that the effect of the deed of the 16th of December 1841, by which the testatrix granted and secured the annuity of 60*l.* to *Evans*, was to keep alive the charges created on the houses by the deeds of the 25th of March 1823 and the 18th of February 1829; and that the two sums of stock secured by those charges, formed part of the testatrix's undisposed-of residue: but *they* submitted, first, that, as the testatrix had become entitled to the property on which those sums were charged and also to the sums themselves, the charges had become merged; and, secondly, that, if the charges were still subsisting, the effect of the will was to give the property to the Plaintiff, freed from those charges.

Mr. *Bethell* and Mr. *C. Hall*, for the testatrix's next of kin, contended that the charges were subsisting; that the language of the will was not sufficient to pass the sums of stock to the Plaintiff, and that it tended rather to keep the charges on foot than otherwise. They said that *Luxmoore's* annuity and the term by which it was secured, were interposed between the stock-mortgages and the fee-simple in the property mortgaged; that the release of the 23rd of December 1839, by which those mortgages and the sums due on them were conveyed and transferred to the testatrix, did not shew either that her father had died intestate, or that she was his heir; and that it conveyed the property to the testatrix, subject, expressly, to the equity of redemption to which it was subject by virtue of the indenture of the 25th of March 1823; and, therefore, the intention of the parties to keep the charges on foot, was apparent; besides which,

the houses would have been assets to pay the father's debts, and therefore it was the interest of the testatrix to keep the charges alive: *Forbes v. Moffatt* (a), *Earl of Clarendon v. Barham* (b); that, by the deed of the 16th of December 1841, by which the testatrix granted the reversionary annuity to *Evans*, she recognised her character as mortgagee of the houses; for, by that deed, she recited that she was in receipt of the rents of the houses as mortgagee and that, on the death of her mother, she became absolutely entitled, not to the houses, but to the two sums of stock and to the securities for the same; and then, by the witnessing part, she assigned the sums of stock and the securities for them to a trustee, upon certain trusts for securing the annuity, and, subject thereto, in trust for herself, her heirs, *executors and administrators*; therefore that deed shewed, most conclusively, that the testatrix considered the charges as subsisting, and the sums of stock secured by those charges, as distinct and separate subjects of property; besides which, the charges must, of necessity, be kept on foot, because they were made part of the security for the annuity granted by that deed; that nothing was to be collected, from the will, in favour of either of the claimants; that, by the words: "the affairs of my late father," the testatrix meant, not the debts due from him to herself, but the debts due to his other creditors; that, at all events, it appeared that the testatrix, very shortly before she made her will, intended the sums of stock to remain distinct from the houses; and, therefore, it was incumbent on the other side to shew that she changed her intention during the short interval between the date of that deed and the date of her will: *Ibbetson v. Ibbetson* (c).

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(a) 18 Ves. 384.

(c) *Ante*, Vol XII. p. 206;

(b) 1 Youn. & Coll. N. C. see pp. 216 & 217.
688; see 701 & 702.

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Mr. *James Parker* and Mr. *Batten* appeared for the executor of the will.

The *Vice-Chancellor*, in the course of the argument, said: The testatrix says: "After the affairs of my dear father shall have been settled, my own just debts, funeral expenses and other legacies having been first discharged, I leave to my dear godson, *Henry Swabey*, my three houses, numbers 1, 2, & 3, *Bedford-square, Brighton*." Now, the sums secured by the mortgages were debts due from her father, and therefore they were debts which the testatrix directed to be paid. How can they be better paid than by releasing or merging them? How can those debts be kept subsisting for the benefit of the testatrix's next of kin?

At the conclusion of the argument, His *Honor* delivered judgment as follows:—

In this case I have to construe the language of a lady, who appears to have made her will without any professional assistance.

She seems to have entertained a strong filial regard for her father, and to have wished that all his debts might be paid. She says: "I wish my just debts and my funeral expenses to be paid. My annuity from *Henry B. Swabey, Esq.* and the residue of the rents of numbers 1, 2, & 3, *Bedford-square, Brighton, Sussex*, after the annuities upon those houses have been paid, I wish to be applied in the settlement of the affairs of my dear father. After the affairs of my dear father shall have been settled, my own just debts, funeral expenses

and other legacies having been first discharged, I leave to my dear godson, *Henry Swabey*, my three houses, numbers 1, 2, & 3, *Bedford-square, Brighton.*" So that she uses the most general terms with regard to her father's debts. I admit that, according to the true construction of the deeds contained in the two reports made by the *Master*, the sums of stock due on the mortgage and further charge, were part of the testatrix's personal estate; and it cannot be disputed that she meant her personal estate to be applied first in payment of debts due from her father to other persons than herself. And it seems to me to be equally clear that, if any surplus should remain after paying those debts, she meant that it should be applied to pay the debts which her father owed to herself, that is to say, she meant the surplus after paying the debts due to her father's general creditors, to merge in the houses on which the two sums of stock were charged.

The consequence is that her next of kin are not entitled to any part of the sums of stock.

Declare that, according to the true construction of the will of the testatrix in the Cause, no part of the two sums of 2,328*l.* 17*s.* 10*d.* Consols and 2,735*l.* 18*s.* Reduced, is to be considered as subsisting for the benefit of her next of kin; but that, subject to the payment of the debt of 1,616*l.* 4*s.* 7*d.*, reported by the *Master* to be due to *Henry Clarke*, and to the payment of the 1,252*l.* 18*s.* 3*d.* reported to have been paid by *M. C. M. Swabey*, the executor, and to the annuity of 80*l.* by the will bequeathed to *T. Evans*, and the legacies thereby given, the Plaintiff is, under and by virtue of the will, well and absolutely entitled to all the right,

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title, and interest of the testatrix, at the time of her death, in, to, and out of the freehold houses at *Brighton*, and the annuity of 480*l.*, &c.*

* Reg. Lib. B., 1845, fo. 673 b.

1846:
 4th March.
Construction.
Sterling or
Currency.
Deed.
Jointure.

COPE v. COPE.

Prior to the passing of the Act for assimilating the currencies of *England* and *Ireland*, an English lady married an Irish gentleman. By their settlement, which was executed at *Bath* where the marriage was solemnized, it was recited that the gentleman had agreed

to charge certain of his estates in *Ireland* with the payment of a rent-charge of 1,000 *l.* a year to the lady for life, in case she should survive him: but the sum secured to her by the deed was expressed to be 1,000 *l.* a year *sterling lawful money of Ireland*. Held, nevertheless, that she was entitled to 1,000 *l.* a year sterling.

IN May 1811, the Plaintiff, *Mary Cope*, widow, who at that time was a spinster domiciled in *England*, intermarried, at *Bath*, with her late husband, *Robert Camden Cope*, of *Loughall*, in the county of *Armagh*, esq. The settlement on their marriage, which was executed at *Bath*, recited that *R. C. Cope* was seised in fee of several towns and lands in *Ireland*, and, amongst others, of the towns and lands of *Grange*, *Loughall*, and *Levelaglish*; and that, in order to make a provision by way of jointure for the Plaintiff (whose maiden name was *Elliott*), he had agreed to charge and encumber the towns and lands of *Grange*, *Loughall*, and *Levelaglish*, with the payment of one annuity, or yearly rent-charge of 1,000 *l.* for the plaintiff during her life, in case she should survive him: but the recital did not express whether the jointure was to be 1,000 *l.* of British money, or 1,000 *l.* of Irish currency. However, the jointure secured by the operative part of the

settlement was expressed to be: "one annuity, yearly rent-charge, or sum of 1,000 *l. sterling, lawful money of Ireland*;" but, in the subsequent parts of the deed, it was mentioned as: "one annuity or yearly rent-charge of 1,000 *l.*" as it had been in the reciting part. By the deed, *Robert Camden Cope* covenanted that the towns and lands on which the jointure was secured, then were, and, during the life-time of the said *Mary Elliott*, should continue to be of the clear yearly value of 1,000 *l. sterling, current money of Ireland*.

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Robert Camden Cope died in 1818. From his death until some time in the year 1828, the right of the Plaintiff to receive 1,000 *l.* a year sterling, was not questioned, and she was paid her jointure accordingly. In that year, a suit, intituled *Lord Ormonde v. Cope*, was instituted in the Court of Chancery in *Ireland* (but not between the parties to the present suit), in the course of which the *Master*, who had been directed to compute the arrears of the jointure then due to *Mrs. Cope*, considered that she was entitled to 1,000 *l.* a year of Irish currency only, and computed the arrears accordingly. But the *Lord Chancellor of Ireland*, *Sir Anthony Hart*, on a petition being presented to him by *Mrs. Cope**, held that she was entitled to be paid at the rate of 1,000 *l.* a year sterling, British money, and ordered the receiver in the suit to pay her the arrears and her jointure in future, after that rate.

The bill in this Cause was filed in consequence of the present owner of the hereditaments on which the jointure was secured, having refused to pay the jointure otherwise than according to its value in the late Irish

* *Mrs. Cope* was not a party to the suit, though she presented a petition on it.

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currency. The object of the bill was to compel him to pay it according to its value in British money.

He demurred generally to the bill.

Mr. *Stuart* and Mr. *Lloyd*, in support of the demurrer, cited *Kearney v. King* (a), *Sprowle v. Legge* (b), *Pickardo v. Machado* (c), *Neville v. Ponsonby* (d).

Mr. *Bethell* and Mr. *Renshaw*, in support of the bill, cited *Lord Ormonde v. Cope* (e), *Lansdowne v. Lansdowne* (f), and *Noel v. Rochfort* (g); they also referred to the 6 Geo. 4, c. 79, (for assimilating the currency and monies of account throughout the United Kingdom) and to a proclamation issued in pursuance of that Act, in *Lloyd and Goold's Reports*, temp. Sugd. p. 351.

THE VICE-CHANCELLOR:

This settlement must be construed, as all other written instruments must be, according to the known rules of the English law. It is not enough to say that, taking the whole deed together, something or other is to be inferred as being the intention of the parties, but you must give that construction to the deed which the words themselves bear. I make that observation, because it is perfectly manifest that what the parties to the deed really did intend, has not been expressed in it: and I think that it is exceedingly material, in such a case as this, where the real question is what is the meaning of four or five words occurring together, to shew that what is actually done by the deed, is not

(a) 2 Barn. & Ald. 301. 111.

(b) 1 Barn. & Cres. 16.

(c) 4 Barn. & Cres. 886.

(d) 1 Jones & Carey's
Irish Exch. C. 113.

(e) 3 Law Recorder, 88,

(f) 2 Bligh, 60: see, 78,

79, 89.

(g) 10 Bligh, N. S., 483;
see 519, 522.

what the parties evidently intended, but is something else to which the law alone can give effect.

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The deed is set forth at length in the bill. It commences, of course, with a statement of the names of the parties, and recites that a marriage was intended to be shortly had and solemnized between *Robert Camden Cope* and *Mary Elliott*, and it proceeds thus: "And whereas the said *Robert Camden Cope* is seised in his demesne as of fee, of and in several towns and lands in that part of the United Kingdom called *Ireland*, and, amongst others, of and in the towns and lands of *Grange*, *Loughall*, and *Levelaglish*, in the county of *Armagh*; and, in order to make a provision, by way of jointure, for the said *Mary Elliott*, in case, after the said marriage had, she shall survive the said *Robert Camden Cope*, her intended husband, he, the said *Robert Camden Cope*, hath agreed to charge and encumber the said towns and lands of *Grange*, *Loughall*, and *Levelaglish*, with their appurtenances, with the payment of one annuity or yearly rent-charge of 1,000 *l.* during her life, in case she shall survive him." So that the intention expressed is to give her an annuity or yearly rent-charge of 1,000 *l.* during her life, in case she should survive her husband. Then the deed witnesses: "that the said *Robert Camden Cope*, for and in consideration of the said intended marriage, and of the marriage portion of the said *Mary Elliott*, and in order to make a competent provision, by way of jointure, for the said *Mary Elliott*, in case, after the said marriage had, she shall survive the said *Robert Camden Cope*, he, the said *Robert Camden Cope*, hath bargained, sold, assigned, transferred, and made over, and by these presents doth bargain, sell, assign, transfer, and make over unto the said *Kenrick Cope* and *Samuel Elliott*, all that and those the said towns and lands of *Grange*,

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Loughall, and *Levelaglish*, situate, lying, and being in the county of *Armagh* aforesaid: to have and to hold all and singular the said hereby granted and assigned towns and lands, tenements, hereditaments, and premises, unto the said *Kenrick Cope* and *Samuel Elliott*, their executors, administrators and assigns, for and during and unto the full end of the term of one hundred years, upon the trusts and to the uses hereinafter mentioned, expressed and declared of and concerning the same; that is to say, upon trust, in the first place, to the use of the said *Robert Camden Cope*, his executors, administrators and assigns, until the said intended marriage shall take effect, and, from and after the solemnization thereof, upon trust, in case the said *Mary Elliott* shall survive the said *Robert Camden Cope*, to permit and suffer the said *Mary Elliott* and her assigns, during the term of her natural life, to take and receive, out of the said lands, one annuity, yearly rent-charge or sum of 1,000 *l.* sterling, lawful money of *Ireland*."

Now it was recited that the intention was to charge the lands with an annuity or yearly rent-charge of 1,000 *l.*; but, under this deed, she never could have an annuity or yearly rent-charge of 1,000 *l.*; for there is not any rent-charge of 1,000 *l.* given to her; nor is there any annuity given to her out of the lands; but the thing that is done is to make a demise to trustees for a term of one hundred years, upon trusts that show an intention to secure payment to her of an annual sum; but that would not be a rent-charge according to the common and obvious acceptation of the word. It was a mode of securing to her, by means of the trusts, an annual payment of 1,000 *l.*, but certainly not a rent-charge. Then the settlement proceeds thus:—"Clear of and over and above all deductions whatsoever; the same to be paid by two even and equal half-yearly payments, on every

first day of May and first day of November, in every year, during the lifetime of the said *Mary Elliott*, the first payment thereof to begin and be made on such of the said days of payment aforesaid as shall first happen next after the decease of the said *Robert Camden Cope*; and, in case the said annuity or yearly rent-charge of 1,000 *l.*, or any part thereof, shall be in arrear or unpaid to the said *Mary Elliott*, or her assigns, by the space of three months next after either or any of the days hereinbefore appointed for the payment thereof, then and as often as it shall so happen, it shall and may be lawful, to and for the said *Mary Elliott* and her assigns, into the said towns and lands of *Grange, Loughall, and Levelaglish*, and of every of them and every or any part thereof, to enter and distrain:” and then there is a provision that, in case of the non-payment within six months, she may enter and keep possession until she is satisfied the 1,000*l.* and all arrears. Now it is quite clear that what was meant, was to give her a power to enter and distrain, and to enter and keep possession: but this instrument gives her no such power; because the tenements themselves are vested in the trustees for an absolute term of one hundred years, in trust to pay the jointure; consequently, if she, under the impression that she had the power, (which, I have not any doubt, they intended to give her), had distrained upon a tenant and he had replevied, she would have been turned round at once at law; because no power to distrain is, in fact, given to her. The deed then goes on:—“ And this indenture further witnesseth, and it is hereby declared and agreed by and between the parties to these presents, that the said annuity or yearly rent-charge of 1,000*l.*, shall be and the same is hereby declared to be in lieu, bar, and satisfaction of all dower and thirds, at common law or otherwise howsoever, which the said *Mary Elliott*

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could or might claim out of the real or personal estates of the said *Robert Camden Cope*." That will do ; because a settlement in equity will create an equitable bar of dower ; but it is quite plain, that, what the parties had in view, was a legal bar to the dower :—" And, further, that the said term of one hundred years hereby created and vested in the said *Kenrick Cope* and *Samuel Elliott*, is so limited to the said *Kenrick Cope* and *Samuel Elliott*, for the purpose of better and more effectually securing the payment of the said annuity or yearly rent-charge of 1,000 *l.* to the said *Mary Elliott* and her assigns, in manner aforesaid, and for no other purpose and with no other intent whatsoever." There the very limitation to the trustees is defeated (*qu.*). The securing of the annuity in manner aforesaid, was meant to be effected by the act of the lady, by virtue of her own power :—" And it is hereby further declared to be the true intent and meaning of all the parties to these presents." Now, this the parties did not intend, and yet they clearly express it ; " that, from and immediately after the decease of the said *Mary Elliott*, the said term of one hundred years, or so much thereof as shall be then to come and unexpired, shall absolutely cease and determine." So that if, at her death, there had been arrears of the jointure by reason of no payment having been made during all the years of her widowhood, not a single farthing could be recovered. The parties could not have meant that ; but they have expressed it, and so it must have been held in a court of law, as between the wife and the person who claimed in reversion or remainder. Then, here you have an instrument in which the meaning of the parties is one thing, and the instrument executed by them for carrying that meaning into effect, is directly contradictory and has a totally different meaning.

It is first of all recited that the husband, in order to make a provision for his wife, had agreed to charge and encumber the towns and lands with the payment of one annuity or yearly rent-charge of 1,000*l.* That is the thing expressed; and I apprehend that, if that had been all and the deed had terminated there, and the parties had forgotten to go on to make a limitation by means of which any jointure or rent-charge, in any form, was created, that recital would have operated as an agreement; and, if the question had been what effect ought to be given to those words, I apprehend that, standing simply as they do, and shewing an agreement to grant one annuity or yearly rent-charge of 1,000*l.*, it must have been taken to be 1,000*l.* of British money. Then follow the words upon which the question has turned: "one annuity or yearly rent-charge or sum of 1,000*l.* sterling, lawful money of *Ireland*;" and those words are to be taken in connexion with the words which are subsequently found in the covenant: "that the lands shall, during the life of *Mary Elliott*, continue of the clear yearly value of 1,000 *l.* sterling current money of *Ireland*." But, before I comment upon those words, I shall first observe, with respect to that covenant, that there seems to me to be a blunder in it; because it is made to extend to the whole of life of the lady, that is, to her married life as well as her widowhood; but she was not intended to take any beneficial interest under the settlement until after the death of her husband.

Having made that remark, I proceed to comment on the words: "sterling lawful money of *Ireland*." Now those words, taken together, have no distinct meaning. There is sterling money of *England*, but there is no such thing as sterling money of *Ireland*; or rather I ought to say, there was no such thing at the time when this

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settlement was executed. Lord *Redesdale* says, in *Lansdowne v. Lansdowne*, (which came before the House of Lords in 1820, and, consequently, before the act of the 6 Geo. 4 was passed): "There is no lawful money of *Ireland*; it is merely conventional. There is neither gold nor silver coin of legal currency; nothing but copper. * * * There is no such thing as Irish money; it is Irish currency." It being then impossible to affix a meaning to the words: "sterling lawful money of *Ireland*," taken altogether, I must deal with them according to the rule of law as to construing a deed; which is that, if you find that the first words have a clear meaning, but those that follow are inconsistent with them, to reject the latter. And it appears to me that there is no other possible method of dealing with this set of words, other than by saying that the words: "one yearly rent-charge or sum of 1,000*l.* sterling lawful money," must be taken to stand by themselves, and the words: "of *Ireland*," must be rejected. Then the words used in the covenant are that the lands shall continue of the yearly value of 1,000*l.* sterling current money of *Ireland*; and those words must be dealt with according to the same rule.

The construction which I have thus put upon the words of the settlement, is that which I was bound to put by the rule of law. But I conceive that, if there had been no such rule, I should not have been at liberty to construe them in any other manner, when I find that the *Lord Chancellor of Ireland* has, expressly and in terms, decided the very question, although between other parties. I certainly feel bound by that decision; because it is the constant habit, both in this Court and in the House of Lords, to defer to the decisions of *Lord Chancellors of Ireland*. Therefore, upon both of these

grounds, (not, at the same time, meaning to express any opinion as to what the parties meant by this confused mass of words), my opinion is that the demurrer cannot be sustained, and therefore it must be overruled.

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JOSSAUME v. ABBOT.

IN this case the personal representative of *A.* was a necessary party to the suit; and, in order to shew that *N.*, one of the Defendants, sustained that character, the bill alleged that *A.* by his will appointed *M.* his executor; that *M.* proved his will in the Prerogative Court of the *Archbishop of Canterbury*, and afterwards died, having made his will and appointed *N.* his executor, and that *N.* proved his will in the proper Ecclesiastical Court.

On the argument of a demurrer for want of parties,

Mr. C. M. Roupell objected that the allegation that *N.* proved *M.*'s will in the proper Ecclesiastical Court, was not sufficient to shew that he was *A.*'s personal representative; and

The *Vice-Chancellor* said that the allegation did not warrant the Court to infer that *M.*'s will was proved in the Prerogative Court, as it ought to have been, in order to make *N.* the personal representative of *A.*; and allowed the demurrer, but gave the Plaintiff leave to amend.

Mr. Piggott appeared in support of the bill.

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4th March.

Pleading.
Representation.
Executor.

If the will of a testator is stated to have been proved by *A.* his executor, in the Prerogative Court, and the will of *A.* to have been proved by *B.* his executor, in the proper Ecclesiastical Court, *non constat* that *B.* is the personal representative of the original testator.

1846:

5th March.

HARRIS v. DAVISON.

*Judgment Debt.
Debtor and
Creditor.*

A. was entitled to an annuity which was secured by a covenant and by an assignment of leaseholds to her, in trust to sell. Held that her interest under the deed might be made available under 1 & 2 Vict. c. 110, s. 13, for payment of a judgment-debt due from her.

BY an indenture, dated the 26th of May 1835, the Defendant, *William Davison*, for the valuable consideration therein mentioned, covenanted for himself, his heirs, executors and administrators, to pay an annuity of 20*l.* to *Jane Lock*, for her life, by quarterly payments; and assigned to her a house and piece of ground, (which he held under a lease for eighty-eight years), in trust for securing the punctual payment of the annuity; and, for that purpose, in case any payment of it should be in arrear for twenty-one days, to sell the house and ground, and, out of the proceeds, to retain the arrears and purchase for herself a government annuity of 20*l.* for her life; and, subject thereto, to stand possessed of the house and ground and the proceeds of the sale thereof, in trust for *Davison*, his executors, &c.

The bill stated that, in April 1839, the Plaintiff obtained a judgment in an action which he had brought against *Jane Lock*, in the Court of Common Pleas at *Westminster*, for 41*l.*, which was duly entered up and docketed on the 23rd of that month. It then stated the indenture of the 26th of May; and that, at the time when the judgment was entered up, the annuity was in arrear, and that no payment on account thereof had been since made by *Davison*, and that a large sum was due from him, to *Jane Lock*, for the arrears. The bill next set forth the 13th sect. of 1 & 2 Vict. c. 110, (for abolishing arrest on mesne process, except in certain cases; for extending the remedies of creditors

against the property of debtors, &c.*), and then alleged that the Plaintiff being advised that, under the Act, the

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* That section is as follows:—" And be it enacted, that a judgment already entered up or to be hereafter entered up against any person in any of her Majesty's superior Courts at Westminster, shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents, and hereditaments (including lands and hereditaments of copyhold or customary tenure) of or to which such person shall at the time of entering up such judgment, or at any time afterwards, be seised, possessed, or entitled for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder, or expectancy, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit, and shall be binding as against the person against whom judgment shall be so entered up, and against all persons claiming under him after such judgment, and shall also be binding as against the issue of his body and all other persons whom he might, without the assent of any other person, cut off and debar from any remainder, reversion, or other interest in or out of any of the said lands, tenements, rectories, advowsons, tithes, rents, and hereditaments, and that every judgment-creditor shall have such and the same remedies in a court of equity against the hereditaments so charged by virtue of this Act, or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been so entered up had power to charge the same hereditaments, and had, by writing under his hand, agreed to charge the same with the amount of such judgment-debt and interest thereon: provided that no judgment-creditor shall be entitled to proceed in equity to obtain the benefit of such charge until after the expiration of one year from the time of entering up such judgment, or in cases of judgments already entered up, or to be entered up before the time appointed for the commencement of this Act, until after the expiration of one year from the time appointed for the commencement of this Act, nor shall such charge operate to give the judgment-creditor any pre-

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judgment operated as a charge on *Jane Lock's* estate and interest: "in the said hereditaments and premises, to the extent of and for securing the aforesaid annuity, and that such annuity and the arrears thereof thereby became liable for the payment and satisfaction of such judgment-debt," he gave *Davison* notice of the judgment, and required him not to make any further payment of the annuity to *Jane Lock*, but to pay the same to the Plaintiff in satisfaction of his judgment-debt; and that he applied to *Jane Lock*, either to assign, to him, the annuity and the arrears thereof and her estate and interest in the hereditaments and premises for securing the same, or to concur with him in a sale thereof and in the application of a sufficient portion of the proceeds to the payment of his judgment-debt; but that *Davison* and *Jane Lock* had refused to comply with his applications. The bill then charged that, by virtue of the Act, the judgment operated as a charge upon the annuity and the arrears thereof and the estate and interest of *Jane Lock* in the hereditaments and premises; and that such annuity, estate and interest, were liable, in equity, to be made available for the payment and satisfaction of the judgment-debt. The bill prayed that an account

ference in case of the bankruptcy of the person against whom judgment shall have been entered up, unless such judgment shall have been entered up one year at least before the bankruptcy: provided also, that as regards purchasers, mortgagees, or creditors, who shall have become such before the time appointed for the commencement of this Act, such judgment shall not affect lands, tenements, or hereditaments, otherwise than as the same would have been affected by such judgment if this Act had not passed: provided also, that nothing herein contained shall be deemed or taken to alter or affect any doctrine of courts of equity whereby protection is given to purchasers for valuable consideration without notice."

might be taken of what was due to the Plaintiff under his judgment; that *Davison* and *Jane Lock* might be decreed to pay, to the Plaintiff, what was due for the arrears of the annuity, in satisfaction, so far as the same would extend, of what should be found due to him by virtue of his judgment; or that the annuity and the estate and interest of *Jane Lock*, under the deed of the 26th of May 1835, for securing payment of the annuity, might be sold under the decree of the Court, and that the proceeds might be applied to pay the judgment-debt or so much thereof as the arrears of the annuity should not be sufficient to pay; or that a receiver of the arrears and growing payments of the annuity might be appointed, with directions to apply the same in payment of the judgment-debt; and that *Davison* might be restrained from paying to *Jane Lock*, and that she might be restrained from receiving any sum of money on account of the annuity or the arrears thereof.

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Mr. *Bethell* and Mr. *Willcock* said, that nothing could be more general than the words of the Act:—"Of or to which such person shall, at the time of entering up such judgment or at any time afterwards, be seised, possessed, or entitled for any estate or interest whatever in law or in equity, whether in possession, reversion, remainder, or expectancy;" and that *Jane Lock* had an interest in the house and ground; for they had been assigned to her in trust to sell, and to pay herself the annuity out of the proceeds. They cited *Scott v. Scholey* (a), in order to show that *Jane Lock*'s interest in the leasehold premises could not be taken in execution by the sheriff under a *fi. fa.*

Mr. *Campbell*, for *Jane Lock*, said that the case was

(a) 8 East, 467.

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not within the 13th section of the Act; for the words, "lands, tenements, rectories, advowsons, tithes, rents, and hereditaments," were applicable to freeholds only; and that those words did not apply even to copyholds; and, therefore, the Legislature added the words: "including lands and hereditaments of copyhold or customary tenure;" that the annuity was not a rent, for it did not issue out of, nor was it charged or secured upon lands in any manner whatever, not even by a power to enter and distrain; but the only security for it was the personal covenant of the grantor: that the assignment was nothing more than an accessory to the covenant, and the premises comprised in it were leasehold, and, therefore, were not included in the before-mentioned words of the section, any more than the annuity was; neither were they included in the word, "hereditaments," which was used throughout the section; for leaseholds for years, it was scarcely necessary to observe, were not inheritable; that the Plaintiff had mistaken his remedy, and ought to have sued out a *fi. fa.*, and, then, perhaps, the sheriff might have taken the annuity-deed as being a security for money.

Mr. *Stuart*, Mr. *Webster*, and Mr. *Torriano*, appeared for other Defendants who had liens on the annuity-deed, but they took no part in the argument.

The VICE-CHANCELLOR:

I have no doubt that the words of the Act do include the interest which *Jane Lock* has in the premises assigned to her.

In the first place, the words of the 13th section are not the same as those of the 12th: the language of the former is much more copious than the language of the

latter. In the next place, the Act is a remedial one; and, therefore, ought to receive a liberal construction. The whole object of the Legislature was to give creditors a more effectual remedy against the property of their debtors than they had under the old law, in compensation for the remedy against the persons of their debtors, which the Act took away from them. What the Legislature meant was to facilitate the obtaining payment of debts, and to do away with the punishment of debtors.

The words of the 13th sect. are: "And be it enacted, that a judgment already entered up or to be hereafter entered up against any person in any of her Majesty's superior Courts at *Westminster*, shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents and hereditaments, (including lands and hereditaments of copyhold or customary tenure), of or to which such person shall, at the time of entering up such judgment, or at any time afterwards, be seised, possessed or entitled for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder or expectancy, or over which such person shall, at the time of entering up such judgment or at any time afterwards, have any disposing power, which he might, without the assent of any other person, exercise for his own benefit." I cannot conceive any set of words better adapted to describe every possible interest in lands of every possible description; they are as comprehensive as possible; and include lands of every tenure, except, perhaps, lands held in ancient demesne. Then the Legislature provides that every judgment-creditor shall have such and the same remedies in a court of equity against the hereditaments charged by virtue of the Act, as he would be entitled to in case the person against whom the judgment should

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have been entered up, had power to charge the same hereditaments, and had, by writing under his hand, agreed to charge the same with the amount of the debt. There the word used is, "hereditaments," which is a general term for every possible description of property. Now, I ask whether it was not competent to *Jane Lock*, for valuable consideration, to make herself, by writing under her hand, a trustee for the Plaintiff of her power* to sell the term, which he might have sold as soon as any quarterly payment of her annuity was in arrear for twenty-one days. I have not the slightest doubt that she might have done so; and, therefore, I am of opinion that the Plaintiff is entitled to have the *trust* performed for payment of his debt†.

* The house and ground were assigned to *Jane Lock* in *trust*, to sell.

† No entry of the decree could be found in Reg. Lib.; but it appeared, from the indorsement on Mr. *Willcock's* brief, that *the annuity* was directed to be sold and the proceeds applied in payment of the Plaintiff's debt.

LEGH v. LEGH.

GEORGE JOHN LEGH, esq., the testator in this Cause, devised his estates situate in *Barton, Lancashire*, to *Edward Geoffrey Smith Stanley*, esq., and three other gentlemen, to the uses &c. declared by the settlement on the marriage of his eldest son, *George Cornwall Legh*, of the estates therein comprised; and he devised his estates in the parish of *Manchester*, in the same county, unto and to the use of *Edwin Corbett* and *John Ireland Blackburne*, their heirs and assigns, in trust, by demise, sale, or mortgage, to raise 5,000*l.* for the portions of each of his younger children, (who were eight in number), and, *subject thereto*, in trust to raise three sums of 1,000*l.* each, and to pay one of those sums to each of his younger sons; and, *from and after the complete performance and satisfaction of all and every the trusts, powers, and authorities thereby given and declared, and subject thereto in the first instance*, and also subject to the payment of such of his debts, whether on mortgage, bond, note, or simple contract, his funeral ex-

1846 :
5th & 6th
March.

Portions.
Will.
Construction.

Testator devised his estates in *B.* to the same uses as the estates comprised in his eldest son's marriage settlement were thereby limited to: and he devised his estates in *M.* to trustees, in trust, by sale or mortgage, to raise portions of 5,000*l.* each for his youngest children; and, *from and after the performance*

of that trust, and subject thereto *in the first instance*, and subject to the payment of such of his debts as his personal estate should be insufficient to satisfy, he devised those estates to his eldest son in fee, and appointed him his executor. The testator died indebted by specialty as well as simple contract: and, his personal estate being insufficient to pay his debts, his eldest son, with the concurrence of the trustees of the estates in *M.*, sold those estates, and exhausted the proceeds in making good the deficiency of the personal estate to pay the testator's debts.

Held that his youngest children were entitled, in respect of their portions, to a charge on the estate in *B.*, equal in amount to the proceeds of the estates in *M.* which had been applied to pay the specialty debts.

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penses and the expenses of the probate of his will, and of the several pecuniary legacies thereafter by him given, as his personal estate should be insufficient to satisfy, he directed *Corbett* and *Blackburne* and the survivor of them and his heirs, to stand possessed of the last-mentioned estates in trust for his son, *George Cornwall Legh*, his heirs and assigns, and appointed him sole executor of his will.

The testator died on the 17th of March 1832.

The bill, which was filed by four of the testator's younger children against the trustees of the will and the persons beneficially interested under it, stated that, after the testator's death, *George Cornwall Legh* possessed himself of all the testator's personal estate, and had the entire management of the testator's property, and paid all his funeral and testamentary expenses, debts and legacies, and also all the portions provided, by the will, except those given to the Plaintiffs; and that, to enable him to make those payments, *Corbett* and *Blackburne* sold or concurred with him in selling the estates vested in them as aforesaid, and permitted him to receive and appropriate the proceeds of the sale accordingly; and that thereby those estates had been exhausted. The bill submitted that the last-mentioned estates were liable, *in the first instance*, to raise the portions, and that no part of them ought to have been applied towards any other purpose until all the portions had been raised; and that, under the circumstances aforesaid, the portions remaining unpaid ought to be raised out of the estates devised to *E. G. S. Stanley* and his co-trustees.

It appeared, from the *Master's* report made in pursuance of the decree at the hearing, that the testator's

personal estate was not sufficient to pay his simple-contract debts, and that *George Cornwall Legh* had applied the whole of the proceeds of the sale of the estates vested in *Corbett* and *Blackburne*, in paying the four portions that had been paid and the testator's specialty debts (which debts alone amounted to more than was due for the portions), and in making up the deficiency of the testator's personal estate to pay his simple-contract debts.

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On the Cause coming on to be heard for further directions,

Mr. *K. Parker* and Mr. *Heberden*, for the Plaintiffs, said that, according to the will, the portions ought to have been paid out of the testator's *Manchester* estates, before any part of those estates was applied in payment of his debts; that it appeared, from the *Master's* report, that those estates were much more than sufficient to pay the portions and also such of the testator's simple-contract debts as his personal estate was insufficient to pay; that the specialty creditors had two funds to resort to, namely, the *Barton* estates and the *Manchester* estates; but the portionists, and the simple-contract creditors whose debts the personal estate was insufficient to pay, had only the *Manchester* estates to resort to; and, as part of the proceeds of those estates had been applied to pay the specialty debts, the portionists were entitled to charge the *Barton* estates to the extent to which those estates had been relieved from the specialty debts.

Mr. *Stuart* and Mr. *Jolliffe*, for the devisees of the *Barton* estates, said that the portionists were merely volunteers, and therefore the Court could not apply the doctrine of marshalling in their favour; that the Coun-

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sel for the Plaintiffs were endeavouring to throw the whole burden of the specialty debts on the *Barton* estates; but as the portionists were, to the extent of their portions, devisees of the *Manchester* estates, the specialty debts ought to be apportioned between the amount of their portions and the *Barton* estates: *Henningham v. Henningham* (a), and *Grocock v. Smith* (b).

Mr. *Bethell* and Mr. *Rolt* appeared for the other parties.

THE VICE-CHANCELLOR:

The intention of the testator must, as between his devisees, govern the case.

It is perfectly manifest, from this will, that the testator meant that such a sum as should be the amount of the portions, should be raised and paid without diminution: and, having expressed that intention, which he directs to be performed in the first instance, he devises the residue of the *Manchester* estates to his eldest son, subject to the payment of his debts, funeral and testamentary expenses and legacies. In the preceding part of his will, he had devised his *Barton* estates, without saying anything about debts; and, of course, it is to be presumed that he anticipated that the *Manchester* estates were so valuable as to leave something for his eldest son after paying the portions and satisfying his debts, funeral and testamentary expenses and legacies. In point of fact, those estates turn out not to be sufficient for those purposes.

(a) 1 Eq. Ab. 117, and 2 Vern. 355. (b) 2 Cox, 397.

I cannot but think that the case is to be considered precisely in the same manner as if the testator had said : "I devise so much of my *Manchester* estates as shall be equal, in value, to 40,000*l.*, free from the payment of any debt ; and I devise the residue of those estates to my eldest son, subject to the payment of my debts : and, as to my *Barton* estates, I devise them, in the form in which the law affects them, to the same uses as are expressed in my eldest son's marriage settlement." Consequently, I shall declare that the testator's *Barton* estates are liable to furnish the sum of 24,000*l.*, which is the amount of his specialty debts.

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TURING v. TURING.

JOHN TURING, esq., the testator in the Cause, made his will, dated the 2nd of December, 1808, and which was partly as follows: "I give and bequeath unto my friends, *J. A. Bannerman, R. Lang, J. G. Franchlyn*, and *E. Kindersley*, the sum of fifty thousand pounds, in trust to be employed, as the money can be

1846:
7th March.

Survivorship.
Will.
Construction.

Testator bequeathed 50,000*l.* to trustees, in trust

for his wife, for life, and, after her death, he gave one-fifth of that sum to the same trustees, in trust to invest it, and pay the interest to his daughter for her life, and upon her demise to appropriate the interest for the use of any her child or children until they reached the age of twenty-one years, and then the principal to be paid to *the survivor or survivors of the children* of his said daughter, share and share alike. The testator also gave 2,000*l.* to the same trustees, in trust to invest it and to pay the interest to his daughter for her life, and after her decease to appropriate the interest for the use of any her child or children until they reached the age of twenty-one years, when the 2,000*l.* was to be paid to *the survivor or survivors of the said children* of his said daughter. The daughter had two children who attained twenty-one, but only one of them survived her.

Held that that child became entitled, on her death, to the whole of the trust funds in which she had a life-interest.

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collected from the proceeds of my estate, for the use and behoof of my wife, Mrs. *Mary Turing*, recommending that the said sum of 50,000 *l.* shall be vested and employed in the public funds of Government, or lent upon the indubitable security of landed property in *Great Britain*, and the interest arising thereon shall be paid to my wife during her natural life, and, upon the demise of my said wife, I give and bequeath the said principal sum of 50,000*l.*, or the produce of the said bequest or settlement of my said wife, to be divided and apportioned in the following manner." The testator then gave to his sons, *John* and *William*, and to his daughter, *Ann*, one-fifth part each of that sum, and another fifth to *J. A. Bannerman* and his co-trustees: "in trust for the children of my daughter, Mrs. *James Bannerman*, namely, *Mary, Jessy, Jean, Helen, William, and James*, recommending that the said money shall be vested in the public funds of Government, or lent upon undoubted landed property in *Great Britain*, and the interest arising therefrom shall be apportioned equally for their maintenance and education until they reach the age of twenty-one years, when each of them shall be paid their due proportion of the principal, share and share alike; and directing that, in the event of the death of either one or both of my said grandsons, *Wm. Bannerman* and *Jas. Bannerman*, the intended share or shares of my intended legacy shall devolve and be equally divided amongst my before-mentioned grandchildren, or *their survivors*, share and share alike. In like manner, I give and bequeath unto my friends as aforesaid, Messrs. *J. A. Bannerman, Robt. Lang, J. G. Franchlyn, and N. E. Kindersley*, in trust, and for the use and behoof of my daughter, *Helen Sophia Darley*, one-fifth part or share of my beloved wife, Mrs. *Mary Turing's* aforementioned jointure or settlement, recommending that

the said money shall be placed in the public funds of Government, or lent upon undoubted security of landed property in *Great Britain*, and the interest arising thereon shall be paid to my said daughter, *Helen Sophia Darley*, during her natural life, and, upon her demise, the interest arising as aforesaid to be appropriated for the use of any her child or children until they reach the age of twenty-one years, and then the principal sum remaining in trust as aforesaid to be paid to the survivor or survivors of the children of my said daughter, *Helen Sophia Darley*, share and share alike." The testator then gave to his sons, *John* and *William*, and his daughter, *Ann*, 6,000*l.* each, and 4,000*l.* to the trustees, in trust for his daughter, *Mrs. James Banner-*
man, for her life; and, upon her demise, he gave that sum to the trustees, for the use and behoof of her children before named: "recommending that, in the event of the death of either one or both of my said grandsons, *Wm. Bannerman* and *James Bannerman*, the intended share or shares of my intended legacy shall devolve and be equally divided amongst my before-mentioned grandchildren by my daughter, *Mrs. James Bannerman*, or their survivors, share and share alike. I give and bequeath unto my friends, *J. A. Bannerman*, *J. G. Francklyn*, *N. E. Kindersley*, and *R. Lang*, esqrs., aforementioned, in trust, and for the use and behoof of my daughter, *Mrs. Helen Sophia Darley*, the sum of 2,000*l.*, recommending that the money shall be vested in the public funds of Government, or lent upon undoubted security of landed property in *Great Britain*, and the interest arising thereon be paid to my said daughter, *Helen Sophia Darley*, during her natural life, and, after her demise, the said interest to be appropriated for the use of any the child and children of my daughter, *H. S. Darley*, until they reach the age of twenty-one

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years, when the aforesaid 2,000 *l.* is to be paid *to the survivor or survivors of the said children* of my daughter, *H. S. Darley*, share and share alike. In the event of my sons, *John Turing*, or *Wm. Turing*, or my daughter, *Ann Turing*, departing this life before my demise, I desire that the amount of the legacy or legacies lapsing by such death or deaths, shall devolve and be equally divided amongst their *surviving* brothers and sisters, share and share alike, on the condition and terms of my original legacies to my said children, particularly to my daughters, *Mary Bannerman* and *Helen Sophia Darley*, and to their children as already specially specified."

The testator died in 1808. His widow died in 1839. His daughter, *Helen Sophia Darley*, died in January 1845. She had three children; a daughter, who was born in 1803, and died in the same year; a son, named *John*, who was born in 1804, and died in 1842; and another son, named *Henry*, who was born in 1806, and was still living.

He presented a petition, praying that the whole of the sums of stock in which the legacies bequeathed in trust for his mother and her children had been invested under the decree in the Cause, might be transferred to him, *as the only child of his mother who survived her*.

Mr. *Bethell* and Mr. *Rogers*, in support of the petition, said that the trusts declared by the will in favour of the survivor or survivors of the children of Mrs. *Darley*, were not intended to take effect until the death of their mother, the *cestui que trust* for life; and therefore the words: "the survivor or survivors of the children of my said daughter *Helen Sophia Darley*," must be taken to mean, the child or children who should

survive her; and, as the petitioner was the only child who survived her, he was entitled to the whole of the funds in question. They cited *Wordsworth v. Wood* (a), *Gibbs v. Tait* (b), *Cripps v. Wolcott* (c), *Newton v. Ayscough* (d).

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Mr. Stuart and Mr. Faber, for the personal representative of *John Darley*, cited *Crozier v. Fisher* (e), and said that the testator contemplated that his daughter, Mrs. Darley, would die leaving infant children; for he had directed that, on her demise, the interest of her one-fifth of the 50,000 *l.* should be appropriated to the use of any her child or children until they reached the age of twenty-one years, and that *then* the principal should be paid to the survivor or survivors of her children; which clearly meant such of her children as should attain twenty-one. They added that, if the construction contended for by the petitioner's Counsel were adopted, there would have been an intestacy in case the two children who attained twenty-one, had died in the life-time of their mother.

The VICE-CHANCELLOR :

The case of *Crozier v. Fisher* is totally different from this. There, the testator said :—" And my further will is that my said trustee shall, from time to time as the rents become due, pay, unto such child or children, a just proportion of such interest, as they shall arrive at

(a) 2 Beav. 25.

(b) *Ante*, Vol. VIII., p. 132.

(c) 4 Madd. 11.

(d) 19 Ves. 534.

(e) 4 Russ. 398. The

cases relative to the periods to which survivorship is to be referred, are collected and observed upon in 2 *Jarman* on Wills, 631 *et seq.*

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their age of twenty-one years." Therefore, there was, at any rate, a gift, the effect of which was to make the share of a child vest as soon as it attained twenty-one. The testator then proceeded thus:—"And to place the interest of the infants' shares in the Three per Cent. Consolidated Bank Annuities, for their own sole use and benefit, and so on, alternately, till the youngest child shall arrive at his or her age of twenty-one years; and then, all the said children, or the survivors of them, to be let into full possession of all the said estates, share and share alike." That is perfectly correct; for, when the youngest child attained twenty-one, all of them, except those who had died, that is to say, all who could be let into possession, would be let into possession. What Sir *John Leach* said, in that case, was that the Court would not, except forced by the plainest words, adopt a construction by which the interest of a child of full age and settled in life, would be divested, if he happened to die before the youngest attained twenty-one: that the word, "survivor," in that case, admitted of another and a more rational meaning, namely, surviving so as to attain twenty-one. And, I say, that all that is meant in this case, is that the children *shall so attain twenty-one as to survive*. It seems to me that the question in that case, was whether such an effect could be attributed to the word, "survivor" (which was used rather ambiguously), as to divest the clearly vested interest that had been given before.

In this case, nothing can be more manifest, when the whole of the words are taken together, than that the testator meant that the children who were to take under the bequest, should be those who survived their mother. First of all, he gives the fund to his wife for life, and then to his daughter for her life, and then he directs that, upon

her demise, the interest shall be appropriated for the use of any the child and children of his daughter, until they reach the age of twenty-one years. So that he there assumes that his daughter would die leaving some of her children infants, and directs that the interest shall be appropriated to their use during their infancy. He then adds :—" And then the principal sum remaining in trust as aforesaid, to be paid to the survivor or survivors of the children of my said daughter, *Helen Sophia Darley*, share and share alike." Now, it is quite absurd to suppose that he meant to give the interest for the benefit of those who, ultimately, might not take the principal. Besides, the interest is given to them as joint-tenants; and the principal is given to them as tenants in common. And, upon the whole, it seems to me that the testator, by the words: "and then the principal money remaining in trust as aforesaid, to be paid to the survivor or survivors of the children of my said daughter," meant those children only to take who should survive their mother.

The words of the second bequest differ so little from the words of the first, that they must receive the same construction. The consequence is that I must make an order according to the prayer of the petition*.

* See *Watson v. England*, ante, p. 1.

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1846 :
16th March.

Charity.
Mortmain.

Testator bequeathed the residue of his personal estate to his executors, in trust for the establishment or institution of a charitable receptacle, if the same could be done, for fifty-four poor old men ; but if no such institution could be conveniently established, he desired that the residue should be disposed of in charitable donations, of 6*l.* each, to persons of the same description.

Held that the bequest was wholly void under the Statute of Mortmain.

THE ATTORNEY-GENERAL v. HODGSON.

THE testator in this case bequeathed his residuary personal estate to his executors : “ in trust for *the establishment or institution of a charitable receptacle, if the same can be done, for twenty-seven poor old men of England* and the same number of *Ireland*, to be under the management of the Roman Catholic Bishop of *London* and the Roman Catholic Bishop of *Dublin* ; but, *if no such institution can be conveniently established*, I request that the same may be disposed of in charitable donations, to persons of the same description, of 6*l.* each ; and, whenever an opportunity offers, that it may be added to any contribution for a similar purpose ; 30*l.* of which sum I give to each of my executors.”

The Defendants to the information were the executors of the testator's late daughter, who, on the renunciation of the executors named in her father's will, had taken out administration to him and possessed herself of his personal estate. The information prayed that the above-mentioned bequest might be declared to be good and valid, and that the charity might be established ; and that the amount of the father's residuary estate might be made good out of his daughter's assets.

The Defendants demurred generally to the information.

Mr. *Bethell* and Mr. *Abraham*, in support of the demurrer, contended that the bequest for the establishment

of a charitable receptacle, was void under the Statute of Mortmain, and that the alternative bequest must fail with it: *Giblett v. Hobson* (a), *The Attorney-general v. Tyndall* (b), *The Attorney-general v. Whitchurch* (c), *Mather v. Scott* (d), *Pritchard v. Arbouin* (e), *The Attorney-general v. Mill* (f), *Henshaw v. Atkinson* (g), and *Blandford v. Thackerell* (h).

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Mr. *Stuart*, in support of the information, said that the word, "receptacle" did not, of necessity, mean an almshouse, or anything else connected with land; that a floating hospital on the *Thames*, was a receptacle; and that, as the testator's intention might be effected without laying out his residuary estate in land, the Court ought to give effect to it: *Johnston v. Swann* (i), *The Attorney-general v. Williams* (k), *The Attorney-general v. Stepney* (l). [The *Vice-Chancellor*.—In *The Attorney-General v. Stepney*, the gift of the house was held to be void. In *Henshaw v. Atkinson*, the testator used the word, "establish" as well as the word, "erect;" and Sir *John Leach* held the former to be equivalent to the latter, and that if the testator had not expressly directed, in the subsequent sentence of his will, that the money should not be applied in the purchase of lands or the erection of buildings, the bequest would have been void.]

Mr. *Blunt*, who was with Mr. *Stuart*, said that, if the

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| (a) 3 Myl. & Keen, 517,
and <i>ante</i> , Vol. V. p. 651. | (g) 3 Madd. 306. See 312
and 313. |
| (b) 2 Eden, 207. | (h) 2 Ves. 238. |
| (c) 3 Ves. 141. | (i) 3 Madd. 457. |
| (d) 2 Keen, 172. | (k) 2 Cox, 387. |
| (e) 3 Russ. 456. | (l) 10 Ves. 22. |
| (f) 3 Russ. 328. | |

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testator's primary purpose failed, his secondary purpose, which was clearly not within the Statute of Mortmain, ought to be carried into effect, either in the manner pointed out by him, or else by means of a scheme to be approved of by the *Master*; inasmuch as the testator had shewn a general intention to devote his residuary estate to charitable purposes.

The *Vice-Chancellor*.—The testator says: "But if no such institution can be conveniently established, I request that the same may be disposed of in charitable donations, to persons of the same description, of 6*l.* each." By those words he means that, if there is any reason why his first purpose cannot be effected, then his second purpose shall be effected. He does not say that if his first intention cannot be *lawfully* carried into effect, then his property shall be distributed in donations of 6*l.* each; he seems to glance at some physical impediment, not at illegality.

Mr. *Bethell*, in his reply, said that the word, "receptacle," meant a permanent place of refuge.

THE VICE-CHANCELLOR :

In this case I must decide, as well as I can, what it was that the testator meant. That he was an illiterate person is perfectly manifest upon the face of his will; because the property that he gives to the trustees for the purpose of establishing the charity, is described thus:—"And the rest, residue, and remainder of my personal property and effects, whatsoever and wheresoever, I give and bequeath to my said executors in trust." Then he proceeds to express a trust:—"But if no such instit

tion can be conveniently established, I request that the same may be disposed of;" and then he mentions a given manner of disposition:—"And, whenever an opportunity offers, that it may be added to any contribution for a similar purpose; 30*l.* of which *sum* I give to each of my executors." Now he had not previously mentioned any sum at all, except so far as the general *corpus* of his estate might produce an amount out of which 30*l.* might be paid to each of his executors. I mention that only to show the loose phraseology in which the testator indulged; but no one doubts what his meaning was.

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He gives the residue of his personal estate: "to my said executors, in trust for the establishment or institution of a charitable receptacle, if the same can be done, for twenty-seven poor old men of *England*, and the same number of *Ireland*, to be under the management of the Roman Catholic Bishop of *London*, and the Roman Catholic Bishop of *Dublin*." Now I cannot divest myself of the notion that those words manifestly point to the acquisition of a dwelling-place of some sort or other; for it was to be procured for twenty-seven poor old men of *England*, and twenty-seven poor old men of *Ireland*, and, of necessity, a receptacle, as applied to human beings, does imply a dwelling-place; and, therefore, it seems to me that there is, of necessity, involved, in this direction, a direction to procure a dwelling-place for fifty-four people of a given description. Then, what is that, in effect, but a direction that land shall be acquired? And there is nothing in this case which points to the hiring or taking, first of all, of one tenement and then of another. But one receptacle only is spoken of, and the whole *corpus* of the fund is to be applied, at once, to procure

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it. There is no direction to apply the interest or dividends of the property, as there was in the case before Sir *J. Leach* (m).

Then the testator says: "If the same can be done:"—why, of course, if it could not be done, it could not be done; but it is quite evident, taking all the words together, that he was looking not only to the procurement of a dwelling-house for those fifty-four persons, but to a system of government to be exercised over them; and, he says, perhaps not unwisely: "to be under the management of the Roman Catholic Bishop of *London*, and the Roman Catholic Bishop of *Dublin*;" describing them by their titles as permanent officers. Next he says:—"But if no such institution can be conveniently established;" not at all contemplating, as it strikes me, the contingency that the law might not permit the thing to be done, but evidently pointing to some impediment of a totally different kind:—"I request that the same may be disposed of in charitable donations, to persons of the above description, of 6*l.* each; and, whenever an opportunity offers, that it may be added to any contribution for a similar purpose."

It appears to me, therefore, that his primary object was the acquisition of a dwelling-place for fifty-four people; and that it was only in the event of that object not being capable of accomplishment, that he makes the general disposition over. And, in my opinion, that general disposition over cannot be said to have taken effect, for there is no allegation about it. Besides which, the

(m) *Johnston v. Swann*, 3 Madd. 457.

testator seems to point at some physical impediment, which might disappoint his first purpose.

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In my opinion the bequest is, according to the cases referred to by the Counsel for the demurrer, within the Statute of Mortmain, and, therefore, I shall allow the demurrer.

RUSSELL v. NICHOLLS.

1846 :

17th March.

THIS was a suit for the administration of a testator's estate.

New Orders.
Counsel.
Costs.

In the course of the proceedings before the *Master* under the decree, a question arose, between the executors and one of the parties beneficially interested in the estate, as to whether certain payments made by the executors and included in their discharge, ought to be allowed to them. As the matter involved questions, both of law and of fact, of some difficulty, the *Master* was attended by Counsel for both parties on the investigation of it. The question was discussed several times; and the *Master*, at first, thought that the payments ought to be disallowed, but ultimately came to the contrary conclusion.

A party beneficially interested in a testator's estate, employed Counsel to attend for him before the *Master*, on a question as to the propriety of allowing certain items in the executor's discharge. Held, notwithstanding the question was one of considerable difficulty, that the expenses of employing Counsel ought not to be allowed in taxing costs as between party and party.

By the order made on the hearing of the Cause for further directions, the costs of all parties were directed to be taxed, the costs of the executors, as between solicitor and client.

The Taxing-master disallowed the costs incurred by

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the party beneficially interested, in employing Counsel on the occasion before mentioned: whereupon he presented a petition, praying that the *Master* might be directed to review his report and to allow those costs.

Mr. *Bethell* and Mr. *Bagshawe*, in support of the petition, said that the costs in question were, in the language of the 120th General Order of May 1845 (a), necessary and proper for the attainment of justice and for defending the rights of the party, and that that Order especially authorised the *Master*, in taxing costs even as between party and party, to allow the costs of procuring the attendance of Counsel before the *Master* on questions relating to title or pleadings; and that the word, "title" did not mean merely title to real estate.

Mr. *Stuart*, Mr. *Willcock*, Mr. *Hallett*, and Mr. *Bates* appeared to oppose the petition.

The *Vice-Chancellor* said that, as the taxation was not concluded until after the 120th Order came into operation, the *Master* was bound by that Order; that he could not think that a question as to the allowance of an item in an executor's discharge, was a question of title, in the sense in which that word was used in the Order; that, if there had been any special circumstances which, the petitioner considered, entitled him to be allowed the costs in question, he ought to have stated those circumstances at the hearing for further directions, and taken the opinion of the Court upon them; that the sole question being whether the *Master* was right or wrong, and His *Honor* being of opinion that the *Master* was right, the petition must be dismissed with costs.

(a) See *Beavan's Ord. Canc.* 333.

ANDREWS v. LOCKWOOD and ABDY.

BY the decree in *Lockwood v. Abdy*, reported *ante*, Vol. XIV., p. 437, the bill was dismissed, as against both the Defendants, with costs, and certain documents which they had deposited with the Clerk of Records and Writs, under an order in the Cause, were ordered, by consent, to be delivered out to them. After the decree had been passed and entered, and after the taxation of the costs of the suit had been commenced, but before it was completed, *Andrews* died.

The bill in *Andrews v. Lockwood and Abdy* was filed by *Andrews's* executrix, to revive the first-mentioned suit. *Lockwood* pleaded, in bar to that bill, that, before it was filed, the documents were delivered to *Abdy* and *Andrews*, and thereby the decree was fully performed and executed, except as to the taxation and payment of the costs thereby directed to be taxed and paid. So that the plea raised the question whether a bill of revivor would lie for costs only.

Mr. *Bethell* and Mr. *Heathfield*, in support of the plea, said that, where a decree directed, amongst other things, the costs of a suit to be taxed and paid by one of the parties personally, and not out of a fund or out of real estate, and nothing remained to be done under the decree, except the taxation and payment of the costs, and one of the parties died before the costs were taxed, it was a rule of this Court, which had been long established, that the suit could not be revived; and that the rule applied whether the deceased party was the

1846:
18th March.

Costs.
Revivor.

—
The general rule, that a suit cannot be revived for costs remains in force, notwithstanding the 1 & 2 Vict. c. 110, s. 18, gives the effect of judgments to decrees and orders of courts of equity.

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ANDREWS

v.

LOCKWOOD
and ABDY.

person to receive or the person to pay the costs: *Jupp v. Geering* (a).

Mr. *James Parker* and Mr. *Goodeve*, in support of the bill, said that, if a party died before decree, the costs of the suit were lost, and there could be no revivor for them; but, in the present case, there had been a final decree, ordering the Plaintiff in the suit to pay the Defendants the costs of it; therefore the costs were a debt decreed to be paid by one party to the other; and it would be most unjust to say that they were lost by one party dying before the other: that every Judge, for a long series of years, had felt the hardship of the rule, and endeavoured to escape from it: that, in the early times of the Court, revivor was not allowed, even for taxed costs (b); but, in modern times, they had been made an exception to the rule: that, in *Jupp v. Geering*, Sir *John Leach* took upon himself to overrule, in effect, three cases which had been decided by three different Lord Chancellors, namely, *Price v. Humphreys* (c), which was decided by Lord *Camden*, a case decided by Lord *Thurlow* (d), and *Morgan v. Scudamore*, which was decided by Lord *Loughborough*: in addition to which, the judgment in *Jupp v. Geering* proceeded upon

(a) 5 Madd. 375. Several older cases were cited in support of the plea. But as they are all reviewed, and the results of them most clearly stated by Sir *William Grant*, M. R., in his judgment in *Lowten v. The Corporation of Colchester*, 2 Mer. 113, the Reporter considered it unnecessary to do more than refer to that judgment. It seems that the taxation of costs is complete as soon as the Master has signed his report. See 2 Dan. Pract. 1410.

(b) See the judgment in *Morgan v. Scudamore*, 3 Ves. 195.

(c) 1 Dick. 381, cited in 3 Ves. 197. See Reg. Lib. B. 1765, fo. 237, and Reg. Lib. B. 1776, fo. 86.

(d) 3 Ves. 197.

a supposed analogy between the proceedings with regard to costs in courts of common law and in this Court ; but no such analogy existed ; for the taxation of costs at common law, always preceded final judgment, and the costs were included in it, and it was upon that judgment that execution issued : but, in courts of equity, the process of execution did not issue on the *Master's* certificate as to costs, but on the decree ; and therefore there was no analogy between the relation which the *Master's* certificate bears to the decree, and the relation which the final judgment at law bears to the interlocutory judgment at law.

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Secondly, that, supposing the rule to have formerly been as the other side had contended for, namely, that there could be no revivor for costs ; that rule was no longer applicable ; for, under the 1 & 2 Vict. c. 110, s. 18, decrees and orders of courts of equity had the same effect as judgments at law, and persons to whom costs in equity were ordered to be paid, were to be deemed judgment-creditors, and to have all the remedies of judgment-creditors ; why, then should not the representative of a deceased party to whom costs had been decreed, have the same right to revive the decree as a judgment-creditor at law had to revive the judgment : that, in order to give effect to that enactment, the 20th section of the Act directed new writs to be framed by the Judges of the Court of Chancery ; and the writs of *feri facias* which were annexed to the new orders of May 1839 (e), did not treat the *Master's* certificate as giving the right to costs, but proceeded on the decree as giving that right, and merely referred to the certificate as ascertaining the amount of the costs ; con-

(e) See *Beavan's Ord. Canc.* 144 and 145.

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sequently, the right to costs stood on a totally different footing from what it had done before that Act was passed.

The *Vice-Chancellor*, in the course of the argument in support of the bill, said that, though the 1st and 2nd Vict. c. 110, gave to decrees of courts of equity the effect of judgments, it did not authorize the newly created judgment-creditor to enforce his judgment in a court of equity.

THE VICE-CHANCELLOR:

I am glad that this question has been brought forward, and I have been much pleased with the arguments in favour of the bill.

The case seems to stand in this way. It is unquestionable, and, indeed, the very argument against the plea, admits that, from a very early period down to the time of Lord *Camden*, a bill of revivor could not be filed for costs. That the rule existed in that way, is undeniable; and the argument of the Counsel for the bill, was directed more against its justice than its existence.

The decision in the case of *Morgan v. Scudamore*, shows the state of the law at that time; and though Lord *Camden* did decide, in *Price v. Humphreys*, in the way in which Lord *Loughborough* states he did, so little authority had that decision, that we find that it was expressly overruled by Lord *Bathurst*, in *Askew v. Townsend*. We further learn, from the judgment in *Morgan v. Scudamore*, that, when the question came before Lord *Thurlow*, that learned Judge did an act which (I say it with great submission) he was not war-

ranted in doing; he directed the *Master* to sign his report after the death of the Plaintiff*. He seems to have gone out of his way for the purpose of giving a right which otherwise, as he thought, would not have existed.

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After Lord *Bathurst's* decision had been made, diametrically opposite to Lord *Camden's*, and Lord *Thurlow* had not decided directly against the decision of Lord *Bathurst*, we have the very laboured judgment of Lord *Loughborough*, in *Morgan v. Scudamore*. We find that the subject was brought before him on two occasions, between which there was a considerable interval of time. It is remarkable that that decision cannot have been taken by the profession to have settled the law, because we find Lord *Eldon* (who was so extremely cautious) laying down the rule in a general way, with one exception (*f*): he was not to be expected to give every exception; but the fact of his stating the rule, and stating one exception, shews that his mind was alive to the state of the practice. Then Lord *Redesdale* states the rule and mentions one exception, namely, where the costs have been taxed before the abatement happened; and his Lordship so laid down the rule in the edition of his work published in 1787, in the subsequent edition of 1814 (*g*), and in the edition which, I think, was published in 1828. No Judges were better acquainted with the law of this Court than Lord *Eldon* and Lord *Redesdale* were.

(*f*) *Jenour v. Jenour*, 10 Ves. 562. See 572. (g) *Treat. on Plead.* 164.

* If the principle of the rule that there shall be no revivor for costs, be, as *Gilbert* states, *For. Rom.* 181, that a personal action dies with the person, it is not very apparent why the rule should not apply to taxed as well as to untaxed costs.

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Then it appears that the question was again discussed in the year 1820 (*h*), which was twenty-four years after the decision by Lord *Loughborough*; and there Sir *John Leach*, evidently by way of answering the argument adduced by Mr. *Spence* against Mr. *Tresolve* and apparently taking it for granted that what Mr. *Tresolve* said was the law, states his reasons for coming to the conclusion that the bill of revivor could not be sustained. Whether those reasons are right or wrong, it is no material to consider. The decision which Sir *John Leach* came to, was conformable to the decisions of Lord Chancellors for nearly a century before; and his decision was not appealed from. The question has now come on before me, after the lapse of nearly twenty-six years since Sir *John Leach*'s decision was pronounced.

Now I am not going to discuss the original propriety of the rule: that is not necessary; but it strikes me that it would not have been just to say that, if there had been a decree that one party should pay costs to another, a bill of revivor might be filed, under all circumstances and at any time. If such were the rule, it would give a perpetuity to the right to costs which no other right enjoys.

I have been told that the general rule is wrong; but I have not yet been told how it is to be altered so as to make it right. That it would be advisable to rescind it wholly, is a matter about which I beg leave to doubt. If the Lord Chancellor thinks proper to alter the rule, on an appeal being presented to him from what I am now about to decide, or may think it right to rescind the rule

(*h*) *Jupp v. Geering*, 5 Madd. 375.

with the assistance of the other Judges of this Court, under the authority vested in them by the Act 3 & 4 Will. 4, c. 94, be it so; with that I have nothing to do. I have only to act upon the rule as it now exists; and I understand the rule to be that, if there be a decree for the payment of costs, and the costs are not taxed and not ordered to be paid out of a fund or out of real estate, there shall not be a bill of revivor for them.

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With regard to the form of the defence to this bill, it was said that the allegation, in the plea, that the documents had been delivered up, was an immaterial allegation, and therefore that the Defendant ought to have demurred. But I think that that allegation was a material one; and, consequently, that the defence was properly made by plea.

As, then, I am of opinion that the defence is good, both in substance and in form, I shall allow the plea*.

* The Reporter has been informed that the Plaintiff has appealed to the *Lord Chancellor*.

1846:
28th March.

PARKINSON v. FRANCIS.

*Evidence of
Death.*

A certified copy of the register of a death, under the seal of the General Registry Office, accompanied by an affidavit of identity, is sufficient evidence of the death.

ON the death of an annuitant under the will of the testator in this Cause, the residuary legatee presented a petition praying that a fund in Court, which had been appropriated to pay the annuity, might be paid to him.

Mr. *Gardner*, for the petitioner, produced, as evidence of the annuitant's death, a certified copy of the register of that event, under the seal of the General Registry Office, and also an affidavit of identity; but stated that, in other branches of the Court, such evidence was not considered sufficient.

The *Vice-Chancellor*, however, made the order, saying that he was bound by Act of Parliament to act upon the evidence tendered*.

* See 6 & 7 Will. 4, c. 86, s. 38, and 8 & 9 Vict. c. 113.

SNOW v. HOLE.

THIS suit was commenced during the infancy of the Defendant *Harriet Hole*. She became of age on the 13th of August 1844, and, about a week afterwards, she informed the solicitor who had acted for her guardian, that he was not to appear or act for her in the suit. In November of the same year, the solicitor was served with a subpoena, for *Harriet Hole*, to hear judgment. He returned the subpoena to the Plaintiff's solicitor, enclosed in a letter, in which he stated that Miss *Hole* had attained twenty-one, and that he was no longer employed for her. In March 1845, the Cause was heard and a decree made, in the title of which Miss *Hole* was described as an infant; but she had not been served with a subpoena to hear judgment, and no one had appeared for her at the hearing. Under these circumstances, a motion was made on her behalf, that she might be at liberty to put in a new and further answer to the bill; that the Cause might be again set down for hearing, and that, in the meantime, all proceedings under the decree might be stayed.

Mr. *James Parker*, in support of the motion, referred to *Kelsall v. Kelsall* (a). [The Vice-Chancellor.—There the decree was made during the infancy of the Defendant; here, it was made after the infancy had ceased.] If she had a right to make the application on the day before the decree was made (as she certainly had), what difference can it make, if a decree has been made by which she is not bound.

hear judgment, or any one appearing for her at the hearing; and a decree was made in which she was described as an infant. Held that she was entitled to put in a new answer to the bill.

1846:
16th April.

Infant.
Practice.
Defendant.

An infant Defendant, on attaining twenty-one, discharged the solicitor who had acted for her in the suit. Afterwards, that solicitor was served with a subpoena, for her, to hear judgment. He returned the subpoena to the Plaintiff's solicitor, and stated at the same time, that the Defendant had come of age, and that he was no longer employed for her. Some months afterwards the Cause was heard, but without the Defendant having been served with a subpoena to

(a) 2 Myl. & Keen, 409.

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Mr. *Bethell*, for the Plaintiff, relied on *Powys v. Mansfield (b)*, and added that Miss *Hole* had been guilty of *laches*, and had wilfully abstained from taking any step from the time she came of age until the Cause was heard, a period of six or seven months, in order that she might have the option of acquiescing in it, or making a new defence, according as the decree might be favourable or unfavourable to her.

Mr. *James Parker*, in reply said that Miss *Hole* swore that she was not aware that the suit was about to be heard, and that the decree was a surprise upon her. He added that, in *Powys v. Mansfield*, Counsel appeared and argued for the infant, at the hearing.

The VICE-CHANCELLOR :

The decree, in the heading of it, purports to be made in a suit between the Plaintiff and certain persons, Defendants, one of whom is *Harriet Hole*, an infant; but there is no person to answer that description; and, therefore, I think that it is open to Miss *Hole* to make the present application; for I must consider that there is no decree against her.

I do not think that the Plaintiff has any right to complain that he has been unfairly dealt with; for the subpoena which was intended for Miss *Hole*, was returned to his solicitor. Notwithstanding which, the decree was drawn up as if she had been properly served.

I shall give her leave to make a new defence; but, as it is in the nature of an indulgence, she must pay the costs of the application.

(b) *Ante*, Vol. VI. p. 637.

DE BEAUVOIR v. DE BEAUVOIR.

THE bill stated that the Rev. *Peter De Beauvoir* made his will, dated the 27th day of July 1800 and duly executed and attested to pass freehold estates in fee simple, and thereby gave, amongst other legacies, 6,000 *l.*, 4 *l.* per cent. stock, to *Richard Peter Whish*, son of *Martin Whish* (since deceased), and *Harriet Whish*; but if *R. P. Whish* should die before he attained twenty-one, the testator then gave the 6,000 *l.* stock to *Martin Whish* and the Defendant, and *their heirs*, during the life of *Harriet Whish*, in trust for her separate use, with power to her to leave the capital, by her will, to her children by *Martin Whish*, in whatever proportions she might think proper; and, after reciting that he was seised in fee simple of divers freehold manors or reputed manors, messuages, lands, tenements, rents and hereditaments, situate in *Middlesex* and *Essex*, and of a leasehold estate in *Pall Mall*, and a copyhold estate in *Surrey* which he had surrendered to the use of his will, and of large sums in the funds in *England*, he gave all his estates in the funds of *England*, and all his said manors or reputed manors, messuages, lands, tenements, tithes, rents, hereditaments and premises, both

1846 :
20th & 21st
April.

Will.
Construction.

Testator devised all his estates in the funds of *England*, and all his manors, messuages, lands, &c., both freehold, leasehold, and copyhold, to *A., B. and C.*, and their sons, in strict settlement, and ultimately to his own right heirs for ever, and empowered his trustees to invest the residue of his personal estate in the purchase of freehold lands in *England*, and to convey the same to such of

the uses thereinbefore declared of his manors, messuages, lands, and premises, devised by his will, as should be then subsisting.

A. and *B.* died, without issue, in the testator's life-time. *C.*, who was his heir-at-law and executor, was living, but had no issue male.

The testator's next of kin filed a bill against *C.*, praying, amongst other things, for a declaration that, in the event of *C.* dying without leaving issue male, the Plaintiff would be entitled to the testator's personal estate. A general demurrer to the bill was allowed.

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freehold, leasehold and copyhold, to *Edward Benyon*, for his life, with remainder to the Defendant and *Martin Whish*, and their heirs, during the life of *Edward Benyon*, in trust to preserve contingent remainders, with remainders to the first and other sons of *Edward Benyon*, successively, in tail male, and, for default of such issue, to *Charles Benyon*, for life, with remainders to his first and other sons, successively, in tail male, with remainder to the Defendant for life, with remainders to his first and other sons, successively, in tail male; and, for default of such issue, *to his own right heirs for ever*. And he gave to *Edward Benyon* all his diamonds, plate, and household furniture, and appointed the Defendant and *Martin Whish* executors of his will, and he empowered his said trustees, with the consent of the person who might be in possession and entitled to the profits thereof*, to lay out and invest, the residue and surplus of his said personal estate, in the purchase of freehold lands, tenements and hereditaments in *England*, and to settle and convey the same, whether purchased, to, for, upon, and subject to such and so many of the uses, trusts, powers, provisoes and limitations thereinbefore limited, created and declared of and concerning his manors or reputed manors, messuages, lands, tenements, rents, hereditaments and premises devised by that his will, as should be then subsisting or capable of taking effect.

The bill next stated that the testator died in September 1821, leaving *Mary Macdougall* his sole next of kin, and the Defendant his heir-at-law; that his personal estate consisted, among other things, of diverse leasehold estates besides those mentioned in his will, and of 100,000*l.* Consols, 100,000*l.* Reduced Three per Cents., 120,000*l.* Navy Five per Cents., 95,000*l.*

Bank Stock, 495 *l.* stock of the Hudson's Bay Company, 10,000 *l.* secured by covenant and deposit of deeds relating to certain estates in *Middlesex*, 3,000 *l.* in Exchequer Bills, a balance of 28,660 *l.* at his bankers, and of other articles of the value of 1,472 *l.*; that *Edward Benyon* and *Charles Benyon* died, in the testator's life-time, without issue, and thereby the Defendant became the first tenant for life under the will, and that the Defendant had never had a son; that, by reason of the death of *Edward Benyon*, the bequest of all the testator's diamonds, plate, and household furniture became lapsed; that, in 1825, the Plaintiff married *Mary Macdougall*; that, in 1827, she, in exercise of the powers vested in her by her marriage settlement, made her will, and thereby gave all her rights and interests under the will or as the next of kin of the testator, or otherwise, and all rights, property and interests in any way vested in her, to the Plaintiff, and appointed him sole executor of her will; that she died in February 1831, and the Plaintiff proved her will, and, as her personal representative and universal legatee and by virtue of his marital rights, became and still was entitled to all such interest in the testator's personal property as his late wife was entitled to, at her death, as the testator's sole next of kin, as well in respect of such parts of the testator's personal property as was undisposed of by his will, *as under the ultimate limitation therein contained in favour of the testator's right heirs.*

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The bill charged that, according to the true construction of the will, the Plaintiff, as the personal representative of his late wife, was absolutely entitled, under the final limitation in favour of the testator's right heirs, in remainder expectant on the decease of the Defendant

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without leaving any son, to all the personal estate and effects which were comprised in and affected by the limitation; but that the Defendant alleged that, according to the true construction of the will, the whole of the said personal estate would, in the event of the death of the Defendant without leaving any son, belong absolutely to him, as the testator's heir-at-law; that sometimes the Defendant alleged that, if the Plaintiff ever had any interest in any part of the testator's personal estate, he had ceased to have any such interest, inasmuch as the whole of such personal estate had been invested in the purchase of real estates under the power for that purpose contained in the will; and that, according to the true construction of the will, such personal estate thereupon ceased to be personal and became real estate, and, as such, would pass, by virtue of the said limitation, to the testator's right heirs in the event of the death of the Defendant without leaving issue male; whereas the Plaintiff charged that a large part of the testator's personal estate still remained in specie and uninvested in the purchase of land, and that such part as had been invested in the purchase of land, had been so invested by the Defendant in the character of heir-at-law of the testator or as tenant for life under the will, and not in his capacity of surviving trustee thereunder; that, according to the true construction of the will, the trustees thereof had only a power to invest the personal estate in the purchase of land, and were not under any obligation or trust so to do; and that it was not the testator's intention that the trustees, by exercising, at their own will, pleasure and discretion, the power of purchasing land, should be enabled to alter the nature of his property; and that, even if the whole of the personal estate had been duly invested, by the trustees, in the purchase of land in accordance with the power, the land so purchased would, in a

court of equity and for the purpose of ascertaining the right thereto under the terms of the said limitation, be considered as personal and not as real estate. The bill prayed that the trusts of the will might be carried into execution under the direction of the Court, and that it might be declared that, under the limitation of all the testator's leasehold estates and estates in the funds of *England* in favour of the right heirs of the testator, the Plaintiff, as the executor of his late wife, (who was the sole next of kin of the testator), would, in case the Defendant should die without leaving any issue male, be entitled to *all* the personal property which belonged to the testator at the time of his decease, and to the stocks, funds, securities, lands or hereditaments then representing the same; and that, if any part of the personal estate had been converted into real estate, it might be declared that such real estate ought, for the purpose of ascertaining the right of the parties interested under the said limitation, to be considered as personal estate.

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The Defendant put in a general demurrer to the bill.

Mr. *James Parker*, Mr. *Lee* and Mr. *Roundell Palmer*, in support of the demurrer, said that the proposition which the Plaintiff had to establish, was that, where freehold, copyhold and personal estate were blended together and limited to several persons in succession, and to their issue in strict settlement, and, ultimately, to the testator's own right heirs, the words, 'right heirs,' meant, with respect to the personal property, the testator's next of kin: that the same question came before the Court in *Boydell v. Golightly (a)*, and,

(a) *Ante*, Vol. XIV., p. 327.

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in that case, His Honor held that the words of the ultimate limitation must be taken in their ordinary sense with regard to the personalty, as well as the realty; that that case was precisely in point, but the present case was a stronger one than that, for there was one devise of real and personal estate in a course of limitation applicable to real estate; whereas, in *Boydell v. Golightly*, the real estate was given first, and then the personal estate was disposed of by words of reference, to which were added—"so far as the nature of the said leasehold and other personal estate and effects, the rules of law and equity, the deaths of parties and other contingencies will admit of;" and, therefore, it might have been said that, under the ultimate limitation, the testator's next of kin were entitled to his personal estate and his heir to his real estate: that *Mounsey v. Blamire* (b) was an express authority for the proposition that a party who seeks to alter the legal and natural meaning of words in a will, must find, in the context, some reason for doing so; but no such reason existed in the present case; on the contrary, the will shewed, conclusively, that the testator meant the words, 'right heirs,' to be taken according to their legal and ordinary import; for he had given his real and his personal estate, as a mixed fund, to the same persons in succession, and had empowered his trustees to lay out his residuary personal estate in the purchase of lands to be settled to the same uses, and, therefore, it was manifest that he did not intend his real estates to go to one person, and his personal estate to another: *Gwynne v. Muddock* (c), *Wright v. Athyns* (d), *Swaine*

(b) 4 Russ. 384. See also (c) 14 Ves. 488.
 the cases mentioned in the (d) 19 Ves. 299.
 note to p. 385.

v. Burton (e), Danvers v. Lord Clarendon (f), Pleydell v. Pleydell (g), Forster v. Sierra (h), Holloway v. Holloway (i), Rich v. Cockell (k), Thellusson v. Woodford (l), Welby v. Welby (m), Anon. (n), Shep. Touchstone, 446 (o), Cholmondeley v. Clinton (p), Pyot v. Pyot (q): that, according to the proposition cited from *Shep. Touchstone*, the right heirs of the testator would have been entitled, if the gift had been a gift of personal property only: that *Vaux v. Henderson (r)* and *Gittings v. MacDermott (s)*, in which the word, 'heirs,' was held to mean, 'next of kin,' were distinguishable from the present case, because the gifts to the heirs in those cases were substitutionary or alternative gifts: that, the only other case in which the word, 'heirs,' even when used with respect to personalty alone, had been held to mean, 'next of kin,' was *Evans v. Salt (t)*; but that case

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(e) 15 Ves. 365.

(k) 9 Ves. 369.

(f) 1 Vern. 35.

(l) 13 Ves. 208.

(g) 1 P. W. 748.

(m) 2 V. & B. 187.

(h) 4 Ves. 766.

(n) Gilb. Eq. Ca. 15.

(i) 5 Ves. 399.

(o) "If one, possessed of a term of years, devise it to J. S., and that, after his death, the heir of J. S. shall have it; in this case J. S. shall have so many years of the term as he shall live, and the heir of J. S. and the executor of that heir shall have the remainder of the term."

(p) 2 Barn. & Ald. 625, and 2 Jac. & Walk. 1. On this case being cited in order to shew that the majority of the judges held the words, "the right heirs of *Samuel Rolle*," to be words of plain and well-known import, the *Vice-Chancellor* observed that the learned judge who dissented from the rest, assigned, as a reason for his dissent, that *George Earl of Orford*, the grantor, knew himself to be the right heir of *Samuel Rolle*; but that that fact did not appear.

(q) 1 Vez. 335.

(s) 2 Myl. & Keen, 69.

(r) 1 Jac. & Walk. 388,

(t) 6 Beav. 266.

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appeared to have undergone no discussion, and no reason was assigned in the judgment.

The *Vice-Chancellor*.—In that case, *Sarah*, to whose heirs the 1,000 *l.* Consols were given in default of issue of *John*, was illegitimate, and, therefore, she could have no next of kin except her children; and, as the testator, in the preceding part of his will, had mentioned her children, the inference seems to be that, if he had meant them to take, he would have said so.

Mr. *Bethell*, Mr. *Hodgson* and Mr. *Bagshawe*, appeared in support of the bill.

Mr. *Hodgson* first addressed the Court, and, after observing that, in the bequest of the 6,000 *l.* stock to *Martin Whish* and the Defendant, in trust for *Harriet Whish*, the testator had used the word, 'heirs,' with reference to personal property, said that the present case differed from all those that had been cited, for, in none of them, was the word, 'heirs,' used to denote the person or persons to take after the failure of a series of limitations: that freehold, copyhold, leasehold and funded property, were given to several persons, who were the objects of the testator's bounty, and to their sons in strict settlement; and, in default of such issue, to the testator's own right heirs: that, under those words, his freeholds would go to his heir-at-law, and his copyholds to his customary heir; why then should not his leaseholds and his funded property go to the person or persons who would take his personal property according to law? that the testator did not intend, by those words, to benefit any person or class of persons in particular; but meant, when all the objects of his bounty, whom he had provided for by the prior

limitations, should become extinct, that his property should go as the law directed ; or, in other words, that, by the term, 'right heirs,' he meant the persons who would legally succeed to the different subjects of property, comprised in the prior limitations, according to their several natures and qualities : that *Mounsey v. Blamire* was distinguishable from the present case, because, as was observed in the judgment, the word, 'heir,' was used to describe a person who was to take, immediately, as a purchaser, and not, as in this case, to denote persons who were to take property, by way of succession, on the failure of several prior limitations : that *Gwynne v. Muddock* was a case of the same description ; and, moreover, the word used in that case, was not 'heirs,' but 'heir,' and, therefore, the Court could not say that each kind of property was intended to go to the persons to whom the law would give it : that, in *Forster v. Sierra*, also, the gift on which the question arose was an original gift ; besides which, it was a gift, not to the testator's own right heirs, but to his heirs on the part of his mother ; consequently, that case had no application to the present : that, in *Holloway v. Holloway*, the words were : "such person or persons as shall be my heir or heirs at law ;" which meant the person or persons who were the testator's heirs at his death : that Lord *Alvanley*'s judgment in that case, shewed that, if his lordship had had to decide the present case, he would have held that the words, 'right heirs,' meant right heirs *quoad* the nature of the property : that *Boydell v. Golightly* was distinguishable from the present case ; for the personal estate was to be held in trust for the same persons as the real estates ; and, as the heir was to take the realty on the failure of the estates for life and in tail, he was rightly held to be entitled, on the happening of that event, to the personalty also ;

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that is to say, he was held to be entitled to the personality as *persona designata*: that no exercise of the power, which had been so much relied on in support of the demurrer, could alter the rights of the parties; for, if lands were purchased and settled, the deed, if skilfully drawn, would provide that, on the failure of the particular estates, the lands should be reconverted into personality; and, if it did not so provide, a court of equity would hold that they resumed the character of personality. He cited *Evans v. Salt*, and *Daintry v. Daintry*(u).

Mr. Bethell.—The distinction between this case and the cases cited, is that the limitation in question is not to the testator's heirs or heir at law, but to his right heir and on the failure of a series of prior limitations, that is to say, it is a limitation of a mere reversion, and whoever takes under it, will take an interest undisposed of by the will, not as a purchaser, but by virtue of the destination which the law gives to property of the like nature and quality. If the testator had died seised of freeholds only, and the defendant, as well as the two other devisees for life, had died in his life-time, the ultimate taker would have taken, not under the will, but by descent. Can then the Court say, in a case where personality as well as realty are comprised in the limitation, that, with respect to the realty, the limitation shall avail nothing at all, but that it shall be of no avail with regard to the personality? If the heir takes the realty by descent, can it be right to say that he takes the personality as *persona designata*? We submit that the limitation is wholly inoperative, and that the personality as well as the realty must be considered to

(u) 6 T. R. 307.

be undisposed of, and must go according to the different destinations which the law gives them.

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The authorities cited in support of the demurrer, are divisible into two classes. The first consists of those in which the heir was *persona designata*, and, consequently, took as a purchaser; as in *Mounsey v. Blamire*, *Gwynne v. Muddock*, *Danvers v. Lord Clarendon*, and the passage in *Shep. Touchstone*. The other class consists of those in which real and personal estate were subjected, as one fund, to a series of limitations or trusts, breaking the descent and making the heir take as a purchaser; as in *Boydell v. Golightly*, *Swaine v. Burton*, *Wright v. Atkyns*, and *Forster v. Sierra*.

In *Mounsey v. Blamire*, the gift was, 'to my heir,' in the singular number, as *persona designata*. In that case, Sir *John Leach* draws the distinction between the word, 'heir,' being used to describe a legatee, and to denote succession, and says: "Where the word, 'heir,' is used to denote succession, there it may be well understood to mean such person or persons as would legally succeed to the property according to its nature and quality." Do not the words, 'right heirs,' here, denote succession, and mean the persons who will legally succeed to the property according to its nature and quality? In *Gwynne v. Muddock* the gift was to, 'my highest heir at law,' in the singular number: and Sir *W. Grant* held, first, that the heir took as a purchaser, and, secondly, that, as a single person was to take the whole of the property, it would be contrary to the words to give any portion of it to the next of kin. In the citation from *Shep. Touchstone*, the gift was to the heir, not of the testator, but of another person; and, therefore, the heir necessarily took by purchase and not by de-

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scent. *Danvers v. Lord Clarendon* is a case of precisely the same description. All that these cases decide is that you may give property either to your own heir or to the heir of another person, in such words as to make the heir a purchaser.

I shall now make some remarks upon the other class of cases cited in support of the demurrer; I mean those in which real estate is given so as to break the descent of it and to make the heir take as a purchaser, and the personal estate is given as an accessory to the real estate. The first of those cases was *Boydell v. Golightly*. That was not a case of legal devise to the persons intended to be benefited; but it was a case of a devise to trustees in trust for them; so that the descent was broken; and, as the right heir would take under the trust, he would take as a purchaser. Then the personal estate was given in trust for the same persons as the real estate, that is to say, it was given as an accessory to the real estate. Your Honor's judgment in that case proceeded on this—that, as the person to take under the ultimate trust declared of the real estate, would take as a purchaser, and as the personal estate was given as an accessory to the real estate, the same person must take the personal estate also, as a purchaser. There is a palpable distinction between that case and the present: in the present case, there is no trust, but a direct legal devise; so that the heir takes the legal estate, not as a purchaser, but by descent. *Swaine v. Burton* was a case of the same description: and Lord *Eldon*, at the commencement and in the subsequent parts of his judgment, notices the fact that the effect of the devise was to break the descent and vest the estates in trustees, who were directed to convey to the persons described, as purchasers. *Wright v. Atkyns* and *Forster*

v. Sierra, also, were cases of trust. In the latter of those cases, the ultimate taker, being the testator's heir on the part of his mother, would, of necessity, take as a purchaser

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In *Vaux v. Henderson*, the testator gave 200 *l.* to *Edward Vaux*, "and, failing him by decease before me, to his heirs;" and Sir *William Grant* decreed that the legacy belonged to the next of kin of *Vaux* living at the testator's death; consequently, that learned judge held that the word, 'heirs,' was to be construed according to the nature of the property given. That case and the language of Sir *John Leach* in *Mounsey v. Blamire* to which I have before adverted, establish this principle: that, wherever personal property is given to a person under the description of heir but in his successional character, the word, 'heir,' must be construed with reference to the nature of the property; and, if it be real estate, it will go to the heir, but, if it be personal estate, it will go to the next of kin. In other words; if I make an immediate devise or bequest to the heir of *A.*, or to my own heir, then the heir-at-law will take; but if I make a devise or bequest to *A.*, and, if he dies in my life-time, to his heir, then the rules of law which regulate the succession to property, determine who is to take. In the present case, the words, 'my own right heirs,' following, as they do, after a series of limitations for life and in tail, are used to denote succession; and, as the individual entitled to the real estates, will be the person pointed out, by the rule of law, to take property of that nature, why is not the individual entitled to the personal estate, to be the person pointed out, by the same rule, to take property of that nature? If the one takes *jure successionis*, why is not the other to take *jure successionis*?

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In conclusion, I beg to call the attention of the Court to the language of Lord *Alvanley* in *Holloway v. Holloway*. That learned judge says: "The only question is whether, upon the true construction of this codicil, it must necessarily be intended he did not mean, by these words: "such person or persons as shall be my heir or heirs at law," what the law, *primâ facie*, would, strictly speaking, intend, heirs at law at his death. A testator certainly may, by words properly adapted, show that, by such words, *persona designata*, answering a given character at a given time, is intended. But, *primâ facie*, these words must be understood in their legal sense, unless, by the context or by express words, they plainly appear to be intended otherwise." Now, there is nothing, in the present will, to show that the words, 'my own right heirs,' were used in any other than their legal sense. There is no trust either executed or executory. All the devises are direct, legal devises; all the bequests are direct legal bequests, and the power to invest the residue in the purchase of lands, is a mere power. All that the testator meant by the words of the ultimate limitation, was that, if all the objects of his bounty failed, his property should go in the ordinary channel marked out by law, that is, his real estates to his heir, and his personal estate to his next of kin.

As the case of *Boydell v. Golightly* has been so much relied on by the Defendant's counsel, I shall make one more observation with respect to it. It was not only a case of trust, but the real and the personal estate were clearly intended to go to the same persons; and that was the ground of your Honor's decision. But, as the present will is framed, if the first tenant for life had had a son, and that son had died within a few hours after his birth, the personal estate would have gone to his ad-

ministrator, but the real estate would have gone to the next in remainder. Consequently, this case wants the ground upon which you decided *Boydell v. Golightly*.

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Mr. *Bagshawe*, after observing that the limitation in question was a limitation of a reversion after a series of limitations which included all the objects of the testator's bounty, and that, if all of them had died before the testator, his real estates would have gone to his heir and his personal estate to his next of kin, added that Sir *John Leach*, who decided *Mounsey v. Blamire*, decided *Gittings v. Mac Dermott* also; and that, in giving judgment in that case, he said: "With respect to the import of the word, 'heirs,' its construction must be governed by the nature of the property; and, this property being personal, those who succeed to it, are not the heirs-at-law, but the next of kin. In the case of *Mounsey v. Blamire*, the word, 'heir,' was a mere word of description, and it was impossible to give, to that word, any other than its legal and technical signification. There happened to be coheirs, and the Court was, consequently, of opinion, to which opinion it still adheres, that such coheirs, as *personæ designatæ* under the word, 'heir,' were entitled" (x).

The VICE-CHANCELLOR, without hearing the reply, said:

It is perfectly true, as a mere proposition of law, that, if a freehold estate is devised to the heir-at-law, (I am now speaking of what the law was before the late alterations), the heir-at-law, whether he is described by that term only, or by his christian and surname, or by any whimsical description which fancy may suggest,

(x) 2 Myl. & Keen, 74.

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takes by the description, but he takes by descent, according to the old rule. But still you have to consider, first of all, whether there is a gift or not; and, if you find the person does answer the terms of the gift but happens to be heir-at-law, then I admit that the old law says he shall not take by devise, but shall take by descent: about that there is no doubt.

I do not mean to enter into a criticism upon the cases such as *Vaux v. Henderson*. The will in that case appears, from the language of it, to have been made by a Scotchman. I allude to the expression: "And, failing him by decease before me, to his heirs." Nobody could read that will without seeing that it was a mere substitution of the persons entitled to the personal estate of the legatee.

It appears, from the recitals of the will in this case, that the testator had freeholds, copyholds and leaseholds, and also what he calls estates in the funds of *England*; and he says: "I do hereby give and devise, after my just debts and funeral expenses and legacies are paid, (which I order to be paid out of my personal estate), all my estates in the funds of *England*, and all my said manors or reputed manors, messuages, lands, tenements, tithes, rents, hereditaments and premises, both freehold, leasehold and copyhold:" and then he gives them in the same manner as if he were making limitations of merely freehold estates in fee simple. Then comes the expression on which the question has arisen: "And, for default of such issue," (that is, after the cessation or never arising of the preceding estates), "I give and devise the same to my own right heirs for ever." The question that was raised was whether the

testator meant that the person or persons who might answer the description of his own right heirs for ever, should, on the determination or failure of the prior limitations, take, collectively, the freeholds, copyholds, leaseholds and personal estate so previously given.

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It seems to me, if you look at the words alone, to be almost impossible to hold that the testator had any other intention than that the same person or set of persons should take; and (there being no doubt what is the true legal construction of the words: "my own right heirs for ever,") the moment you have ascertained, by applying the rules of law to the explanation of those words, that a given individual does answer the description of the right heirs, it follows, as a necessary consequence, that that person must be the ultimate taker of everything previously given.

But, if there were a doubt as to what was the true construction of those words, the power which is subsequently given, seems to me to remove it.

The testator says: "And I do give a power to my said trustees, with the consent of the person who may be in possession and entitled to the profits thereof, to lay out and invest the residue and surplus of my said personal estate (he had previously not given the whole of his personal estate) in the purchase or purchases of freehold messuages, lands, tenements and hereditaments within that part of *Great Britain* called *England*, and to settle and convey the same, when purchased, to, for, upon and subject to such and so many of the uses, estates, trusts, powers, provisoes and limitations hereinbefore limited, created and declared of and concerning my said manors or reputed manors, messuages, lands, tenements,

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rents and hereditaments." Now those are the words by which he has described his freehold estates in that part of his will where he devises them*, and, to those words he adds the word, "premises." Now, what are the premises? Why, some of them are leasehold estates, some of them are copyhold estate, some of them are personal estate. Now I should like to know how the freehold estates, if any were purchased with the surplus of the personal estate, could be limited to the uses and trusts declared concerning his freehold estates and premises; if part of those estates and premises was considered as going, under the former part of the will, to the heir-at-law, part was considered as going to the copyhold heir, and a part was considered as going, according to the construction contended for, to the persons who might be the testator's next of kin. This clause, though it is not very happily expressed, is decisive to shew that the testator did contemplate that there should be but one set of limitations and one set of takers; and that the person who finally was to take the ultimate estate of inheritance in the freeholds, should be that person who should also take the ultimate estate in the copyholds, and the ultimate interest in the leaseholds and in what the testator describes as his estates in the funds of *England*.

Demurrer allowed.

* The words of the devise were: "I give and devise all my estates in the funds of *England*, and all my said manors or reputed manors, messuages, lands, tenements, tithes, rents, hereditaments and premises."

RUSSELL v. SMITH.

MOTION to dissolve an injunction restraining the Defendant from pirating, publicly performing, singing or reciting certain songs and musical compositions.

1846 :
22nd and 23rd
April.

*Copyright in
Musical Composi-
tions.*

The Plaintiff, by his bill, claimed the property in the songs, under an assignment from the author of them, and in the music to which they were set, as being, himself, the composer of it. His proprietorship in the songs and music, had been duly registered at Stationers' Hall; and he had caused them to be printed and published; and the Defendant had purchased them of the publisher.

The copyright in musical compositions is more extensively protected than the copyright in dramatic pieces.

In support of the motion, it was said that the protection given to musical compositions by 5 & 6 Vict. c. 45, sect. 20 (to amend the Law of copyright), was not more extensive than the protection given to dramatic literary property by 3 & 4 Will. 4, c. 15*, but both the one and the other were put upon the same footing.

* The 3rd & 4th Will. 4, c. 15, limits the privilege thereby conferred on authors of dramatic works to representing, or causing them to be represented, *at any place or places of dramatic entertainment*. The 20th section of the 5th & 6th Vict. c. 45, is as follows: "And whereas an act was passed in the third year of the reign of his late Majesty, to amend the law relating to dramatic literary property, and it is expedient to extend the term of the sole liberty of representing dramatic pieces, given by that act, to the full time by this act provided for the continuance of copyright: And whereas it is expedient to extend to musical compositions the benefits of that act and also of this act; be it therefore enacted that the provisions of the said act of his late Majesty, and of this

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The *Vice-Chancellor* said that the words of the songs were protected by the former copyright acts, and the music of them, by the act of Victoria : that the words, "at any place or places of dramatic entertainment," which occurred in the act of Will. 4, were omitted in the act of Victoria ; and, therefore, the authors of musical compositions were more extensively protected than the authors of dramatic pieces were.

Injunction continued as to all the subjects of it except the music of two of the songs, which appeared not to be original* : the Plaintiff to bring an action against the Defendant. Costs and liberty to apply, reserved.

Mr. *Stuart* and Mr. *Chandless* moved.

Mr. *Bethell* and Mr. *M. Matthews* opposed.

act, shall apply to musical compositions, and that the sole liberty of representing or performing, or causing or permitting to be represented or performed any dramatic piece or musical composition, shall endure and be the property of the author thereof and his assigns, for the term in this act provided for the duration of copyright in books; and the provisions hereinbefore enacted in respect of the property of such copyright and of registering the same, shall apply to the liberty of representing or performing any dramatic piece or musical composition, as if the same were herein expressly re-enacted and applied thereto, save and except that the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent, in the construction of this act, to the first publication of any book."

* Eight consecutive bars of the music to another of the songs were not originally composed by the Plaintiff, but his *Honor* refused to make any alteration in the injunction except as above stated ; because the eight bars formed only a small part of the whole composition.

HOLLINGS v. KIRKBY.

IN this case the *Vice-Chancellor* held that if an heir-at-law files a bill stating that the will of his ancestor was duly executed and attested, but dies before the cause is heard, leaving an infant heir, the will must be proved notwithstanding that statement; because the original heir might have dismissed his bill and claimed adversely to the will.

Mr. Brett and Mr. Hislop Clarke were the counsel in the cause. Mr. Brett referred to *Robinson v. Cooper* (a), and *Lock v. Foote* (b).

(a) Ante, Vol. IV., p. 131.

(b) Ibid. 132.

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24th April.

Heir.
Practice.
Will.

If an heir files a bill stating that his ancestor's will was duly executed and attested, but dies before the cause is heard, leaving an infant heir, the will must be proved.

CHAMBERS v. CHAMBERS.

DAME FRANCES CHAMBERS, by her will bearing date the 30th December 1837, devised all her messuages, lands, tenements, and hereditaments situate at Putney, in the county of Surrey, to her son, Robert Joseph Chambers, and two other gentlemen,

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24th April.

Will.
Construction.
Residue.
Enjoyment in
Specie.
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Testatrix bequeathed the residue of her estate, goods, chattels and effects, which she should be possessed of, interested or entitled to at her decease, to trustees, with very special directions to apply the whole of the income thereof, for the benefit of her daughter, (who was a lunatic,) for her life.

Held, nevertheless, that the bequest of the residue was not specific, and consequently, that certain leasehold houses, which formed part of it, ought to be sold and the proceeds invested in the Three per Cents.

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during the life of her daughter, *Annie Chambers* (a lunatic), in trust to pay and apply the rents to and for the sole and separate use, benefit and advantage of her said daughter, during her life, and, after her decease, to the use of the testatrix's grandson, *Robert Collins Chambers*, with remainders over. And she gave to *Robert Joseph Chambers*, 2,000 *l.*, part of a sum of 10,000 *l.* which he owed her. "And, as to the sum of 8,000 *l.*, residue of the said sum of 10,000 *l.*, I give and bequeath the same, and all the rest, residue and remainder of my estate, whether real or personal, goods, chattels and effects, whatsoever and wheresoever, and of what nature or kind soever, that I shall or may be seised or possessed of, interested in, or entitled unto at the time of my decease (including the sum of 10,000 *l.* stock, formerly New Four per Cent. Annuities, but since converted into Three-and-a-Half per Cent. Annuities, which, on or about the 11th of July 1823, I transferred into the names of *Alexander Nowell*, *William Frederick Chambers*, and *Martin Ware*), unto the said *Robert Joseph Chambers*, &c., their executors, administrators and assigns, upon trust, that they, the said *Robert Joseph Chambers*, &c., their executors, administrators and assigns, do and shall stand possessed of and interested in my said residuary estate and effects, for the use, benefit and advantage, comfort and happiness of my said dear daughter *Annie Chambers*, during her life: and I particularly direct and authorize my trustees to pay or allow to such companions and attendants as my said daughter, *Annie*, may wish to have, and, particularly, Miss *Martha Eades* and Miss *Emma Sayer*, such salaries and remuneration as my executors may think fit: and, inasmuch as it is my earnest wish and desire that my dear daughter, *Annie*, shall have her own, exclusive establishment; and, inasmuch as I deem it necessary for her comfort

and happiness that she should continue to live in the same style to which she has hitherto been accustomed, I direct my trustees to see that *the whole of my said daughter Annie's income*, as well that possessed by her in her own right and not derived from me, as that given by this my will for her benefit, shall, during her life, be applied and actually expended for her comfort, benefit and happiness; and that no accumulations whatever be made therefrom; and, for the purpose of ensuring, as far as I can, that my will shall, in this respect, be performed, I declare it to be my will, and I do hereby direct that the whole of my said daughter *Annie's* income, possessed by her in her own right and not derived from me, shall, annually, in the first place, be applied and expended for her benefit; and that, in each year during my said daughter *Annie's* life, no part of the income which, by this my will, is given for her benefit, shall be so applied for her benefit, until the whole of my said daughter *Annie's* own income for the current year (so far as such income shall have been received or receivable and capable of being so applied) shall have been so applied and actually expended: but, in case (from whatever cause) my will shall not be in this respect complied with, and any such accumulations as aforesaid shall be made (excepting always the income accrued or accruing for the current year in which my said daughter *Annie* may happen to die), then, from and immediately after the decease of my said daughter *Annie Chambers*, I do hereby give and bequeath all such accumulations as shall have been made as aforesaid from my personal estate and effects, unto the trustees for the time being of the National Benevolent Institution, for the charitable purposes of that institution: and, save and except such accumulations as last aforesaid (if any), from and after the decease of my said

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daughter *Annie Chambers*, as to all my said residuary estate and effects, for, and I do hereby give and bequeath the same unto my said son *Robert Joseph Chambers*, his executors, administrators and assigns, subject to the payment, within three calendar months after the death of the said *Annie Chambers*, of the several legacies hereinafter bequeathed." The testatrix then gave several pecuniary legacies, and appointed *Robert Joseph Chambers* and the Plaintiff her executors.

She died in April 1839. *Robert Joseph Chambers* died in May 1843. The Defendant, *Elizabeth Chambers*, was his executrix.

The testatrix's residuary personal estate was more than sufficient to pay all the legacies which were payable on the death of *Annie Chambers*. It consisted, in part, of five houses in *Marylebone*, held under a lease for ninety-seven years, which would expire in March 1856. The bill alleged that the Plaintiff and *Robert Joseph Chambers*, for some time, applied the rents of those houses for the maintenance and comfort of *Annie Chambers*, under the impression that she was entitled to them; but that the Plaintiff had been advised that he and *Robert Joseph Chambers* ought to have sold the houses, and invested the proceeds in the 3*l*. per Cent. Consols, and to have applied the dividends to the use of *Annie Chambers*, and retained the capital as part of the testatrix's residuary estate; and that the Defendant, *Elizabeth Chambers*, had required the Plaintiff so to do; but *Annie Chambers* and the committees of her estate, insisted that the houses ought not to be sold, and that the whole income thereof ought, during her life or until the determination of the term of ninety-seven years, to be

applied for her use and maintenance: that her income amounted to 2,100*l.* a year, in which was included 243*l.* (the amount of the rent produced by the houses): and that the whole of her income was allowed for her maintenance, by reason of the provision in that behalf contained in the testatrix's will. The bill prayed that the testatrix's estate remaining unadministered, might be administered under the direction of the Court, and that it might be declared whether the houses ought or ought not to be sold; and, in case the Court should be of opinion that they ought to be sold, that it might be referred to the *Master*, to inquire and state whether certain contracts which the Plaintiff had entered into for the sale of them, ought to be carried into effect.

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The cause now came on to be heard as a short cause.

Mr. *Willcock* appeared for the Plaintiff.

Mr. *Stuart* and Mr. *Collins*, for the Defendant *Elizabeth Chambers*, the personal representative of *Robert Joseph Chambers*, said that the bequest to the trustees for the benefit of *Annie Chambers* for life, was a mere residuary gift, and, consequently, it was a matter of course to sell the leaseholds and invest the proceeds; and that the testatrix intended that her daughter should have one uniform income for her support during her life, and that it should not be liable to be reduced by the expiration of the leases in her life-time: *Howe v. Lord Dartmouth* (a), *Sutherland v. Cooke* (b).

Mr. *James Parker* and Mr. *Malins* for *Annie Cham-*

(a) 7 Ves. 137.

(b) 1 Coll. Rep. 498.

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bers and the committees of her estate, said that recent authorities had narrowed the proposition laid down in *Howe v. Lord Dartmouth*; that the will contained no direction for the sale of any part of the residue; nor was there any necessity for a sale, for none of the legacies were payable until after the death of *Annie Chambers*; and the will contained a clear indication of intention that she should enjoy the property in such a shape as would give her the largest possible income, and also very particular directions for the application of the whole of it, for her support and maintenance during her life; and, on those grounds, they submitted that the gift of the residue was specific: *Bethune v. Kennedy* (c), *Collins v. Collins* (d), *Daniel v. Warren* (e), *Pickering v. Pickering* (f).

THE VICE-CHANCELLOR :

There is no difficulty in this case: but, as there appears to have been some fluctuation of opinion upon the question, I will state my opinion upon it more at large than I otherwise should have done.

Lord *Eldon* laid down the rule, very distinctly, in *Howe v. Lord Dartmouth*; but Lord *Cottenham* seems to have had a disposition to escape from it. And, in *Pickering v. Pickering*, where there was an enumeration of particulars, his lordship thought that, as the enumeration shewed an intention to give the things specifically, the aggregate, though given merely as a residue, was to be treated differently from what it would have been, if the simple word, 'residue,' had been used.

(c) 1 Myl. & Cr. 114.

(d) 2 Myl. & Keen, 703.

(e) 2 Youn. & Coll. 290.

(f) 4 Myl. & Cr. 289.

That case and all the other cases that are deviations from the rule laid down by Lord *Eldon*, can only be supported by the particular expressions in each will. In *Bethune v. Kennedy*, which was the first case cited by Mr. *Parker*, there was, first of all, a gift of a sum of Long Annuities; and, in the set of words which constituted the gift of the residue, there was a reference to money in the funds and to copyhold estates, which, for aught I know to the contrary, might be a very good reason for saying that, in that particular case, Lord *Eldon's* rule should not be adopted. Then, in the next case, *Collins v. Collins*, which was decided by Sir *John Leach*, we find the emphatic words: "in every shape and in whatever manner it is situated;" which, also, for aught I know to the contrary, might have justified the departure from Lord *Eldon's* rule. In *Collins v. Collins*, which came before Vice-Chancellor *Knight Bruce*, the testator directed the whole of the property to be sold in the event of the first taker dying without leaving issue to attain the age of twenty-one years. Now, there cannot be two sales of the same property: therefore, it is manifest that the directing the property to be sold on the happening of a future and contingent event, prevented the application of the general rule.

It appears to me that, independently of the general rule, the actual words in this will are such as show that the person who was to take in remainder, was to take that thing which was to be enjoyed, in the first instance, by the tenant for life; because the testatrix gives the residue in these words: "I give and bequeath all the rest, residue and remainder of my estate, whether real or personal, goods, chattels and effects, whatsoever and wheresoever, and of what nature or kind soever, that I shall or may be seised or possessed of, interested in, or

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entitled unto at the time of my decease, including the sum of 10,000 *l.* (stock &c.) unto the said *Robert Joseph Chambers, &c.*, upon trust that they, their executor administrators and assigns, do and shall stand possessed of and interested in *my said residuary estate and effects*, for the use, benefit and advantage, comfort and happiness of my dear daughter *Annie Chambers*, during her life:" and then she goes on to say: "And, after the decease of my said daughter, *Annie Chambers*, as to all my said residuary estate and effects, for, and I do hereby give and bequeath the same unto my said son *Robert Joseph Chambers.*" But how was he to take 'the same,' if the leases under which the houses were held had expired in the life-time of the tenant for life

Therefore, by force of the rule laid down by Lord *Eldon*, and by force of the particular words to be found in this will, my opinion is that the leaseholds must be sold (g).

Declare that, according to the true construction of the will, the leaseholds ought to be sold, the proceeds invested in the 3 *l.* per Cents., and the dividends paid to *Annie Chambers*, during her life.

(g) See *Benn v. Dixon*, ante, Vol. X., p. 636.

FRISWELL v. KING.

IN a suit for the administration of the late Lord *Kingsborough's* estate, his solicitors claimed a lien on certain copies of a very expensive work written by his lordship, and intitled: "*The Antiquities of Mexico*," which the publishers had delivered to them in order that they might be produced to the witnesses, on the trial of an action brought, against his lordship, by a tradesman who had supplied the paper for the work, and which his lordship had refused to pay for, on the ground that it was of very inferior quality. The lien was claimed in respect of the costs of defending the action.

Mr. *Bagshawe* supported the claim, and cited *Ex parte Nesbitt (a)*.

Mr. *Bethell* opposed it on the ground that solicitors had a lien on deeds and papers delivered to them for the purposes of an action, and on the money recovered in it; but not on articles, such as models of machines or the books in the present case, which had been delivered to them for the purpose of being exhibited, to the witnesses or to the jury, on the trial of the action.

The VICE-CHANCELLOR:

The books tended to manifest the Defendant's right to defeat the Plaintiff in the action; and, therefore, I cannot but think that the solicitors have a lien upon them.

(a) 2 Scho. & Lef. 279.

1846:
28th April.

*Solicitor and
Client.
Lien.*

A solicitor's lien for costs, is not confined to deeds and papers, but extends to other articles delivered to him for the purpose of being exhibited to witnesses on the trial of an action.

1846.
27th and 28th
April.

*Husband and
Wife.
Parties.
Pleading.*

Bill against a husband and his wife for the specific performance of an agreement, made by the husband, for the sale of an estate to the Plaintiff. The bill alleged, as the grounds for making the wife a Co-defendant, that she claimed an interest in the purchase-money, and had taken forcible possession of the title-deeds and refused to part with them unless her claim was satisfied.

The Court held that she was improperly made a Defendant, and allowed a demurrer by her, for want of equity.

MUSTON v. BRADSHAW and WIFE

THE bill was filed for the specific performance agreement between the Plaintiff and the Defendant *William Bradshaw*, for the sale of an estate by the Plaintiff. The bill alleged, as the grounds making *Mrs. Bradshaw* a Co-defendant, that she took forcible possession of the title-deeds after the agreement was entered into, and refused to part with them on a claim which she made, to have part of the purchase-money settled on her for her separate use, was satisfied.

She put in a separate demurrer, which was supported by Mr. *Stuart* and Mr. *Steere*.

Mr. *Bethell* and Mr. *Toller* supported the bill.

The *Vice-Chancellor* over-ruled the demurrer, that, if the bill had stated, in a distinct manner, that the husband was about to make a conveyance in violation of his wife which would prevent him from performing his contract, that would have been a good reason for filing a bill, against him and his wife, to restrain from making the conveyance: but the bill charged no such effect, that the wife claimed an interest in the purchase-money, for her separate use, and that that interest was created subsequently to the contract and without the knowledge of it on her part; that neither that circumstance nor the fact that a practical difficulty in performing the contract, had been created by her conduct, was sufficient to sustain the bill as against her.

THE ATTORNEY-GENERAL v. THE EARL OF
DEVON.

PETER BLUNDELL made his will, dated in the
year 1599 and, partly, in the following words :

"I will that my executors or the survivors of them,
by the advice and directions of my overseers and of the
survivor of them, with all convenient speed, upon a fit
and convenient plot and piece of ground, in *Tiverton*

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2nd, 4th, 5th,
6th, 25th, 26th,
and 27th May,
8th and 10th
June, and 29th
October.

*Grammar
School.
Charity.
Will.
Construction.*

P. Blundell, by his will dated in 1599, founded a *free grammar-school*, for one hundred and fifty boys born, or, for the most part, before their age of six years, brought up in the town or parish of *Tiverton*; and directed that, if that number could not be filled up, the want should be supplied with *the children of foreigners*, and those *foreigners* only to be admitted with the assent and allowance of such ten householders of the town as should be most in the subsidy-books of the then queen and her successors ; and that there should be no scholar, at the school, *under a grammar scholar* ; and after providing that there should be a master and usher for the school, and that their yearly salaries should be 50 *l.* and twenty marks respectively, he willed that they should be content with that recompense, without seeking or exacting any more, either of parent or children, it being his meaning that the school should be a free-school, and not a school of exaction.

Held that the terms, "*foreigners and children of foreigners*," meant children who had not been born, or, for the most part, before the age of six years, brought up in the town or parish of *Tiverton* ; that though it had long been the practice for the master and usher for the time being to take boarders, that practice ought to be discontinued ; that, there being no longer any subsidy-books, a new qualification ought to be fixed for the ten householders ; that, though some of the trustees of the charity property resided at a considerable distance from *Tiverton*, they ought not to be removed, notwithstanding the testator had directed that vacancies in the trusteeship, should be supplied by persons near inhabiting ; and, there being a surplus of the income of the charity property, that the salaries of the master and usher ought to be increased, and that the propriety of appointing more ushers, and of extending the education of the scholars to matters of science and literature, including one or more of the modern languages, ought to be referred to one of the *Masters* of the Court.

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aforesaid, by my executors for that purpose to be purchased and procured, shall erect and build a fair school-house, to contain, for the place of teaching only, in length, one hundred feet, and, in breadth, twenty-four feet; a hall, buttery and kitchen, all of convenient space and bigness, to be joined to it, with fit and convenient rooms over the same hall, buttery and kitchen; all the windows well and strongly glassed, and barred with iron bars and well covered; the floor of the school to be well planked with planks of oak, supported and borne from the ground with strong ledges or beams; with so many fit and strong settles and forms as shall be convenient, having regard to the bigness of the same school and number of scholars to be taught therein; and to be divided, on or near the midst, with some fit partition of four feet in height or thereabouts, if it shall be so thought fit; and this school to be strongly wainscoted round about, and the same wainscot to extend about five or six feet above the settles or forms; and with such settles, forms and seats, and in such manner to be framed, placed and devised as shall be thought most convenient; the hall to be also planked or paved, and also wainscoted round about as high as the loft; and to have, in the hall and chamber over the same, one or other chimney; and, in the kitchen, one, fair, great chimney, with an oven, and a chamber over the kitchen, with a chimney therein, as, to my said executors and overseers or the survivors of them, shall be thought meet; and that there shall be, adjoining to this school-house, a convenient garden and woodyard, with a fit house and easements therein of and for the ease of the scholars, upon or as near the river Exe there, or Loman, as may be; and the said school-house, garden, woodyard and house of ease to be, roundabout, well walled and inclosed with a strong wall; the going in and forth to be at one only place,

with a fair strong gate, with a little door, as is usual in the school; and, for that my desire is that these things shall be very well, strongly, artificially and substantially done, my will is that my executors shall bestow therein 2,400 *l.* within the least, if the premises require; and my will and meaning is that, in and about these several buildings, plot, frame and all the parts thereof, the advice and directions of my right dear and honourable friend, Sir *John Popham*, Knight, Lord Chief Justice of *England*, shall be taken and followed; and, to him, I give power and authority to alter and change what part or parts thereof, for the manner of building, largeness and conveying the premises, he shall think good; and his directions, in every thing, for the effecting of my said purpose herein and in all other things hereafter in my will mentioned, touching the same or other circumstances thereof hereafter mentioned, to be still followed and executed.

“ Item, my will and meaning is that, in the said school, shall not be taught above the number of 150 scholars at any one time, and those, from time to time, of children born, or, for the most part, before their age of six years, brought up in the town or parish of *Tiverton aforesaid*; and, if the same number be not filled up, my will is that the want shall be supplied with the children of foreigners, and those foreigners only to be received and admitted, from time to time for ever, with the assent and allowance of such ten householders of the said town of *Tiverton aforesaid* as, for the time being, shall be most in the subsidy-books of our sovereign lady the *Queen's Majesty* and of her successors for ever, and not otherwise; and my meaning and desire is that they, from time to time, will make choice of the children of such foreigners as are of honest reputation and fear God,

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without regarding the rich above or more than the poor; and that there shall * be no scholar * be or continue in the said school, as a scholar, but boys, and none above the age of eighteen years or under the age of six years, *and none under a grammar scholar.*

“ And my will and meaning is that the said schoolmaster shall, for his time being, have the use of the rooms and buildings aforesaid, and also one usher shall have, in the said building, one chamber to himself only; and the schoolmaster for the time being, shall have, yearly for ever, 50 l. to be paid quarterly, and the usher, twenty marks, to be paid in like manner, quarterly: and my hope and desire and will is *that they hold themselves satisfied and content with that recompence for their travail, without seeking or exacting any more, either of parent or children, which procureth favour to givers, and the contrary to such as do not or cannot give; for my meaning is it shall be, for ever, a free-school, and not a school of exaction.*

“ And, for the better making, establishing, maintenance, and continuance of *the said free grammar-school* and schooling for ever, I do, by this my last will and testament, give, appoint and devise, all my lands, tenements and hereditaments in the county of *Devon*, unto Sir *Francis Popham*, Knight, *Anthony Pollard*, Esq., *Richard Blewett*, Esq., *Charles Beere*, Esq., *Roger Ayshford*, Esq., *Roger Warre*, Esq., *Roger Gifford*, Esq., *James Clarke*, Esq., *Henry Worth*, Esq., *John West* the elder, *Humphrey Colman*, *John Waldron*, *E. Amy*, *N. Skinner*, *G. Slee*, *R. Hill*, *R. Prows*, my cousin, *John West* the younger, *P. West*, *R. Chilcott*, *John Demond*, *John Blundell*, *P. Blundeil*, *William Tanner*, *Roger Slee*, *W. Crasse*, *Anthony Crasse*, and to

their heirs and assigns for ever; who, I hope, will accept the same as feoffees whom I have specially chosen to bear trust and confidence in the premises, out of which the 50 *l.* and the said 13 *l.* 6*s.* 8*d.* shall be quarterly paid as aforesaid; and 40*s.* yearly for ever, to a perfect clerk for the time being to be appointed by the said feoffees or the most part of them, from time to time, for keeping a true and perfect book of survey and of granting and demising the said lands and of the money received and paid of and for the same and of other their proceedings in and about the premises, taking, always, warrant of all his doings, from the said feoffees or the most part of them, with their hands always to be subscribed, as well in that behalf as for and concerning the other things to them committed by this my last will and testament; and other 80*l.*, yearly, to go, always, to the reparations of the said school and other things necessary concerning the same for ever; and, what else shall be needful or requisite in or about the said school or other circumstances thereof, I leave to the direction of the said Lord Chief Justice, which my executors shall perform and accomplish.

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“And so as much as the true labour and exercise of husbandry is a thing very profitable in the commonwealth and acceptable and pleasing to Almighty God, and, yet, at this present time, in most places, much neglected and decayed, my will and desire is that 20 *l.*, yearly, shall be employed and disbursed, by the said feoffees, yearly for ever, as followeth, that is to say, the sum of 5*l.*, yearly for ever, * of such four poor boys born, and, for the most part, brought up in the said town or parish of *Twerton*, of the age of fifteen years or under, as, to the said ten inhabitants for the time being for ever, shall be thought meetest, whose parents shall be dwelling in the

* *Sic.*

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said town or parish, to be bound to serve in husbandry for seven years or upwards, the said 5 *l.* to be delivered to the master he shall so serve, with assurance, to be taken by the said clerk, for repayment as followeth, that is to say, to the servant, if the same seven years' service or more be by him duly and truly done with the said master or his assigns; and, if the same service be not done accordingly in the servant's default, in every such case, the same 5 *l.* to be repaid and be bestowed towards the relief of poor householders in *Tiverton* town aforesaid, at the discretion of the said ten inhabitants or of the most part of them; and, if the same service be in part done accordingly, and then the said servant happen to die in the said service within the time agreed of, then to go to the executors and assigns of the same servant; with that, I doubt not but the master of the said servant will, during the time he hath the said money, employ the same to some good and godly use for the said servant's benefit, as my meaning is; and if in the said parish of *Tiverton*, there shall not yearly go forth, in the service of husbandry, so many as aforesaid then the want to be, from time to time*, of foreigners *of and in other places adjoining*, as, to the said feoffees or to the most part of them, shall be thought meet; the same order and course to be observed of the same foreigners as is before limited of the others.

* *Sic.*

“ And my will and meaning is that the said feoffees for the time being, or the most part of them, shall, from time to time, make, establish and set down such orders, laws and directions, both touching the school and matters of husbandry and all matters and circumstances thereof, and touching all parties to be interested therein or to have any thing to do about the same, as, to them or the most part of them for the time being, shall be thought meet for the governance, maintenance and con-

tinuance thereof according to my true intent and meaning; and that the schoolmaster and usher for the time being shall be elected, nominated, appointed, displaced and removed by the said feoffees for the time being for ever or the most part of them, having always the approbation and allowance of the Ordinary of the diocese of *Devon* for ever for the time being to the said election, nominating, and appointing only.

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“And my will, meaning and desire is that the feoffees by me nominated and appointed as aforesaid, and their and all other feoffees of the said lands for ever hereafter, when and as often as, by death or otherwise, they shall come to the number of thirteen with the least, the *said same* *, with the heirs of the others deceased feoffees, if they be not unfit, and, for such as shall be unfit then others *near inhabiting* of honest report and reputation, by alteration of their possession, shall make up, with themselves, the number of five-and-twenty feoffees again with the least, so as * the continuance of the said school and matter of husbandry and other good purposes aforesaid : and my true meaning herein expressed resteth in the trust, providence, circumspection and care of the said feoffees for the time being, which I hope they will accomplish and perform accordingly as they will answer the same before the Majesty of Almighty God at the dreadful day of judgment, when the secrets of all hearts shall be disclosed.

* *Sic.*

* *Sic.*

“And for that my lands in *Devon* are not yet of sufficient value by the year to supply my said will, intent and meaning concerning the said schooling and matter of husbandry, my will, therefore, is that my executors, after my death, shall, with the advice aforesaid, purchase lands or rents to a full supply thereof, *and what overplus hereafter shall happen to be, the same shall be*

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employed to the performance of the rest of my will or to such other employments as I shall hereafter appoint.

“ And, for the increase of good and godly preachers of the gospel, my will is that my executors, forthwith after my death, shall disburse and bestow the sum of 2,000 l. in and about the founding and establishing six scholars to be students in divinity in the University of *Oxford* or *Cambridge*, or in both, for ever, and in and about the purchasing, procuring, founding and establishing of lands and tenements, the yearly profits whereof shall be employed for and about their said placing and maintenance for ever, in such manner as to the said Lord Chief Justice, or, in his default, to my executors, upon good advice, or the most part of them, shall be thought meetest; and my meaning is their exhibition and payment shall be and continue to them, severally, from their said first coming to the said Universities, until they severally shall be, or, by the orders and constitutions of their houses, might be, bachelors in divinity, or otherwise shall be fellows of any house or houses, or shall be beneficed in the country; and as they shall be so or in the like manner severally preferred or promoted, or as they, in the meantime, shall fortune to die, my will is that their several places shall for ever be supplied with scholars to be elected and chosen, by the said feoffees or the most part of them, with the advice of the schoolmaster there for the time being, out of the said *grammar school* of *Tiverton*, and not elsewhere, and that of the aptest and most toward in learning, and such as, of themselves or parents or otherwise, least able to maintain themselves in the said University; and, for the founding, establishing and perfecting of the said six scholars for ever, and of the said lands for their maintenance, and of the elections and orders aforesaid, and for all other things fit to be done in and about the same,

I wholly refer to the direction and finishing of the said Lord Chief Justice, most humbly praying his good lordship to be pleased to take the same upon him, and to finish the same with all convenient speed, and, in his default, to my said executors upon very good advice as aforesaid; and, for the first six to be placed in the said University or Universities, I leave to the nomination and appointment of the said Lord Chief Justice and of my said executors, not doubting but as they shall be afterwards promoted or removed as aforesaid, or, otherwise, shall fortune, in the meantime, to die, others fit to be there placed as aforesaid will arise and spring up into the *said grammar-school of Tiverton.*"

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The testator appointed his friends, *Wm. Craven* and *Wm. Parker*, merchant tailors of *London*, and *Geo. Slee* of *Tiverton* and *John West* the elder and *John West* the younger, late of *Tiverton*, his executors; and his friends *Jas. Clark* of *Norton*, in the county of *Somerset*, *Richard Spurway*, his cousin, *Richard Prows*, *John Chilcott*, and *Robert Chilcott*, all described as of *Tiverton*, to be supervisors or overseers for the execution of his will. The testator died in the year 1601; and the information, which was filed in March 1840, against the then feoffees and the master and usher of the school, stated that, within four years after his death, two schools, one for the master, and the other for the usher, were built, with dwelling-houses and offices for the master and usher, under the direction of Sir *John Popham*, with inclosed gardens and a play-ground attached; and that, in and after 1615, several fellowships and scholarships were founded in the Universities of *Oxford* and *Cambridge*, pursuant to the directions in the will.

The information further stated that, in 1735, a decree

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was made on an information filed in the Court of Chancery in 1734, by which it was declared that there ought to be a majority of the trustees present at the meetings for electing the master, usher and scholars of the school, and that such election ought to be made by the majority of the trustees then present: and that, on the hearing of that Cause for further directions in 1740, it was ordered that the surplus of the produce of the charity-estates which was then in the hands of the trustees, might be applied either in the augmentation of the existing scholarships or in founding new scholarships, as the trustees, from time to time, should think fit.

The information in which this case is intituled, further stated, that a petition had been lately presented to the Court, by some of the feoffees, under 52 Geo. 3. c. 101, (*Sir Samuel Romilly's Act*), by which it was amongst other things, stated, that the annual income of the charity-property, (which had been increased by bequests made, from time to time, by different persons), amounted, in the whole, to 1,060 *l.*; and that there was then a balance of 1,200 *l.* in the hands of the treasurer: that the annual, average expenditure and outgoings in respect of all the charities, did not exceed 810 *l.*, and it was calculated that there would be a surplus annual income of 300 *l.* after providing for all the payments and necessary expenses of the charities: that the petition further stated that the number of children born, or, for the most part, before the age of six years, brought up in *Tiverton*, had not amounted to one hundred and fifty: so that that number had been, from time to time, made up of the children of foreigners; but, inasmuch as there had not been subsidy-books in existence since the time of King *Charles* the Second, the mode of admission of the children of foreigners, could not be according to the directions contained in *Blundell's* will, and, ever since

the remembrance of the oldest inhabitants of the town and parish, the children of foreigners had been admitted into the school, without the assent and allowance of ten householders of the town; but, a few days before the annual public examinations of the boys for scholarships or exhibitions, if any one of such foreign boys became a candidate for a scholarship or exhibition, he obtained the assent or allowance of some ten householders of the town or parish, who signed a certificate in the following form: "We, whose names are hereto subscribed, being ten of the householders of the town of *Tiverton* who are most in the subsidy-books of our Sovereign Lady the Queen's Majesty, do assent and allow that *A. B.* son of *C. D.* shall be received and admitted as a scholar at *Mr. P. Blundell's* free-school, according to the said *Mr. Blundell's* will, there not being the number of one hundred and fifty scholars born, or, for the most part, before the age of six years, brought up in the town or parish of *Tiverton*:" which written admission, so far back as could be remembered, had been signed by *any* ten householders of the town or parish, without reference to the amount at which they were rated for taxes: that the petition further stated that there then were, in the school, twenty-nine boys only who were born, or, for the most part, before the age of six years, brought up in *Tiverton*, and eighteen more boys, the children of foreigners; and *there were also forty-four boarders* in the master's house, and ten in the under-master's or usher's, all receiving education in the school: that the petition prayed that one of the *Masters* of the Court might be directed to approve of a scheme for the application of the balance which was or might be in the treasurer's hands, and of the annual surplus income derived and to be derived from the charity-property, and also of a scheme for regulating the admission of the children of foreigners into the

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school and for the selection of the boys to serve in husbandry. The information then stated that the petition was heard by the *Vice-Chancellor of England* on the 4th June 1839, when counsel appeared of the principal inhabitants of *Tiverton*; but, objection being made, on behalf of the feoffees, to the said counsel being heard, on the ground that they had not been served with the petition, his Honor decided against hearing them, and made an order, *ex parte*, according to the prayer of the petition *: that another petition was, afterwards, presented, under 52 Geo. 3, c. 101, by several persons of respectability and substance in *Tiverton*, with the concurrence of a large majority of the inhabitants, whereby, after stating the several matters aforesaid and the former petition and order, and, also, that it was the testator's intention that the school should be a *free-school*, and that none but *free-scholars* should enjoy the benefits of it; but that a large majority of the boys then at the school were boarders, to whom a very considerable number of the exhibitions and scholarships were given: that it was desirable that the system of education at the school, should be extended to science and general literature as well as Greek and Latin; and that it was the testator's intention that the feoffees should be persons connected with *Tiverton* and living in it or in its immediate neighbourhood: and that the majority of the then feoffees had no connection with *Tiverton* and resided at a distance therefrom: it was prayed that the *Master* to whom the former reference had been made, might be directed to inquire and state of what the charity-property then consisted, and how held, and what was the income thereof; and that it might be

* The petitioners carried in a scheme under this order; after which, all further proceedings under it, were stayed by the *Lord Chancellor*, until the hearing of the Cause. See *post*.

declared that the whole surplus income of it, after providing for the scholarships and exhibitions, ought to be employed for the benefit of the school, and that such benefits ought to be confined to free-scholars only, and that the master and under-master of the school ought not to receive any payments from the boys educated there, and ought not to be allowed to take boarders, or, at least, that none but boys educated as free-scholars, ought to be eligible to the scholarships and exhibitions ; and that the *Master* of the Court might be directed to settle a scheme for the proper application of the said surplus income, having regard to the said declarations and the intention of the testator ; and that, in settling such scheme, he might be at liberty to consider whether, having regard to the will and the then condition of the town, it would be proper to apply any part of the income to provide instruction, in the school, in science or literature or other matters of useful education besides Greek and Latin ; and, if he should be of opinion that it would be proper so to apply any part of the surplus, then that he might include the same in the scheme ; and that it might be declared that the feoffees ought to be persons residing in *Tiverton* or its immediate neighbourhood, and that the *Master* of the Court might inquire and state where and at what distances from *Tiverton* the then feoffees resided, and that all proper directions might be given for securing a proper application of the charity-property for the future : that the petition was heard before the *Vice-Chancellor of England* on 14th February 1840, the same having been duly served on the feoffees and also on the master and under-master of the school, who appeared by counsel and opposed the prayer ; and that his Honor ordered that the petitioners should be at liberty to attend the *Master* of the Court under the order of reference made on the former petition, and to carry in a scheme under that order, and that the

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consideration of the costs of and consequent upon such attendance, should be reserved until after the *Master* should have made his report; but his Honor dismissed the rest of the last-stated petition, and ordered the petitioners to pay the whole costs of it.

The information charged that it was the intention of the testator that the school *should be a free-school*, and that the benefits thereof should be enjoyed by free-scholars only; and that it was contrary to his intention that there should be any boys in the school whose parents paid towards their education therein; whereas a large majority of the boys were taken *as boarders* by the master and under-master, who received considerable annual payments, from their parents, for their education, to the detriment of the free-scholars: that considerable sums had been expended on the buildings and premises of the school, with the object, principally, of accommodation to the boarders: that a considerable part of the exhibitions and scholarships had been bestowed on boys who had been boarders in the school, in evident violation of the founder's intention; and that the advantage of being eligible to the exhibitions and scholarships had been held out, by the master and under-master, to induce boys to enter the school as boarders: that provision ought to be made for *extending, to the free-scholars, the benefit of education in science and general literature, including the modern languages*, as well as Greek and Latin, the income of the charity-property being amply sufficient for that purpose: that, though the population of the town of *Tiverton* * amounted to about 10,000, the number of free-scholars then in the school, born or brought up as aforesaid in the town, amounted to

* The population of the parish of *Tiverton*, including the town, was ten thousand and forty-one.

twenty-nine only: that, during the last forty years*, only 343 boys born or, for the most part, under six years of age, brought up in the town, had been admitted into the school, although 1,897 boys, not so born or brought up, and who were not educated as free-scholars, had been admitted during the same period: that the benefit of the scholarships and exhibitions ought to be confined to boys educated as free-scholars: that it was the intention of the testator to confine the benefits of the school to boys living in the town of *Tiverton* or in its immediate neighbourhood, and that, by the term, 'foreigners,' he did not mean to describe or include any persons living at a distance from the town, or at such a distance therefrom as prevented them from sending their sons to be educated, as day scholars, at the school: that the parish of *Tiverton* was very large, extending over 17,000 acres and upwards, and many parts thereof were at a distance of four miles and upwards from the school; and the testator, in the directions given by his will for the buildings to be erected for the purposes of the school, had reference to the accommodation of boys who might come, from such distant parts of the parish, to the school, and provision ought to be made to prevent boys being sent from distant parts, as they then were, to participate in the benefits of the school and exhibitions, to the exclusion of the proper objects of the charity: that it was the intention of the testator that the persons who should be, from time to time, appointed feoffees of the school, should be persons connected with the town and living therein or in the immediate neighbourhood thereof: that it would conduce, greatly, to the right management of the school and the just application of its revenues for the benefit of the children of the town and its neighbourhood, and the

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proper appointment to the scholarships and exhibitions, that the whole or the greater part of the feoffees should be chosen from inhabitants of the town or its near vicinity or who were connected therewith : that the majority of the present feoffees had no connection whatever with the town, and resided at a distance therefrom, four only of such feoffees living in the town or within five miles thereof, that, of the others, one resided in *France*, and another in *Guernsey*, and the rest at various distances from *Tiverton*, the greatest of which was seventy miles : that the persons residing at such distances were wholly unable properly to attend to the duties of the trust, and much inconvenience had, on many occasions, arisen from the difficulty of assembling a sufficient number of the feoffees* : that some proper provision ought to be made for the due admission of the children of foreigners into the school and the election of boys to serve in husbandry, and some proper qualification ought to be approved of for the ten householders by whose assent the children of foreigners were to be admitted into the school : that the order of the 4th of June 1839, made by the *Vice-Chancellor* upon the first-mentioned petition, was beyond the bounds prescribed by the provisions of the 52 Geo. 3, c. 101 ; and the same or the greater part thereof, was invalid ; inasmuch as there was not any jurisdiction, under the said act or otherwise, to make the same upon the said petition.

The information prayed that it might be referred, to the *Master*, to inquire and state of what the charity-property consisted, and what was the clear income thereof ; and that it might be declared that the whole surplus income of the charity-property, after providing

* This charge was denied, and there was no evidence in support of it.

for the exhibitions and scholarships as they then existed, ought to be applied to the upholding and benefit of the school and matters of husbandry, and that the benefits arising therefrom, ought to be confined to free scholars only : and that it might be declared whether the masters of the school ought or ought not to receive any payments from the boys educated in the school ; and ought or ought not to take boarders ; and whether none but boys educated as free-scholars, ought to be eligible to the scholarships and exhibitions : and, whatever the opinion of the Court might be as to the construction of the will and the constitution of the charity, that it might be referred, to one of the *Masters* of the Court, to settle a proper scheme for the general regulation and management of the school, and the proper application of the surplus income thereof, having regard to the said declarations ; and that, in settling the scheme, the *Master* might be at liberty to consider whether, having regard to the will and intent of the testator and the present condition of the town and the increased income of the property, it would be proper to add to the number of ushers and assistants in the school, and to augment the salaries of the present master and under-master ; and whether it would not be proper that some and what part of the surplus income of the property, after providing for the education in grammar as by the will directed, should be applied in providing instruction in matters of science and literature, including the modern languages ; and that he might be at liberty to include such direction, provision and regulation in the scheme to be settled by him as he might think proper : and that it might be ascertained and declared what persons were intended under the description of foreigners in the will mentioned ; and that the manner in which the children of such foreigners were for the future to be received and admitted into the school, according to the direction contained in

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the will, might be fixed and declared, and some proper qualification settled for the ten householders mentioned in the will, in lieu of the qualification therein prescribed and that, if necessary, it might be referred to the *Master* to settle a scheme for that purpose: and that the *Master* might be also directed to settle some proper scheme for the management of the property of the charity: and that it might be declared that the feoffee ought to be persons residing in the town of *Tiverton* or its immediate neighbourhood; and that the *Master* might inquire and state at what distance from the town the present trustees of the charity resided; and that such of them as should appear to be residing out of *England* or at such a distance from the town of *Tiverton* as the Court might be of opinion was beyond the distance at which the feoffees ought to reside, might be removed from being feoffees; and that some proper persons might be appointed to be feoffees in their place and that all proper directions might be given and inquiries made for effectuating the objects aforesaid and for securing a proper administration and application of the charity-property and the income thereof for the future.

A great deal of evidence was entered into on both sides. That on the part of the relators tended to shew amongst other things, that the number of boarders at the school, from the year 1770 down to 1840, greatly exceeded the number of free-scholars; the former being one thousand eight hundred and ninety-seven, and the latter, only three hundred and forty-three: that sums had been paid, to former masters of the school, for the education of day-boys, some of whom were born in the town, and others in the parish of *Tiverton*: that the master and usher paid more attention to the education of the boarders than they did to the education of the free-scholars, and favoured them in other respects: that the

boarders were allowed to compete, with the free-scholars, in the examinations for exhibitions and scholarships, and, owing to their superior education and the partiality of the masters, were generally successful; that the free-scholars were ill-treated by the boarders; and that it would be beneficial to the inhabitants of *Tiverton* to extend the system of education in the school.

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The evidence for the Defendants proved that the practice of taking boarders had continued for a great number of years, and was almost coeval with the school; and that the boarders behaved kindly, and the masters impartially, in every respect, to the free-scholars.

Mr. *Bethell*, Mr. *Walker*, Mr. *Blunt* and Mr. *Heathfield*, for the Relators.—The school was founded for the education of one hundred and fifty boys born, or for the most part, before the age of six years, brought up in the town or in the parish of *Tiverton*: and, if that number should not be filled up, the want was to be supplied by the children of foreigners. Consequently the town and parish boys were the primary objects, and the children of foreigners, the secondary objects of the charity. But, by the term, “foreigners,” the founder meant, not children whose parents lived in distant parts of the kingdom, but in the parishes adjacent to *Tiverton*; for he directs that they shall not be admitted to the school, except with the assent and allowance of ten householders of the town; and that the householders shall make choice of the children of such foreigners as are of honest reputation and fear God. Those directions shew that he intended the householders to select the children of persons with whom they were acquainted; that is, of persons who lived in their neighbourhood; for, at the time when the will was made, there was but very little intercourse or acquaintance except between persons who lived near

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each other. That such was his meaning is made still more clear by a subsequent passage in his will; where he says: "And if, in the said parish of *Tiverton*, there shall not, yearly, go forth, in the service of husbandry, so many as aforesaid, then the want to be, from time to time, of foreigners *of and in other places adjoining.*"

Secondly, the boys at the school were to be day-scholars and not boarders. This may be inferred from the directions which the founder gives, (and which are very minute,) respecting the buildings to be erected on the plot of ground which he orders his executors to purchase. Those buildings were to consist of a school-room, and of a hall, buttery and kitchen, with rooms over them. The rooms and the buttery and kitchen, were intended for the accommodation of the master and usher and their families and servants, as were also the garden and wood yard. The hall was intended for the boys, who might come from distant parts of the extensive parish of *Tiverton* or from the adjoining parishes, to take their meals in, but they were to sleep at their own homes; for the will makes no mention of dormitories; nor does it speak of a play-ground, or make any provision for the boys attending a place of divine worship. In addition to which, the testator, after specifying the salaries to be paid to the master and usher, says: "And my hope and desire and will is that they hold themselves satisfied and content with that recompense for their travail, without seeking or exacting any more either of parent or children, which procureth favours to givers, and the contrary to such as do not or cannot give; for my meaning is, it shall be, for ever, a free-school and not a school of exaction." That passage puts the matter beyond dispute.

It being, then, clearly established that boys born, or

for the most part, before the age of six years, brought up in the town or the parish of *Tiverton*, and boys whose parents resided in the neighbouring parishes, were the sole objects of the foundation, and that the master and usher were not intended, indeed, we may say, were expressly forbidden to take boarders or to exact any payment either of parent or children, we proceed to shew that, for a great many years past, the school has been conducted upon a system which is in direct opposition to and has, almost entirely, frustrated the testator's intention, not only as it is to be inferred from, but as it is declared in his will. The buildings erected in pursuance of his will, have been enlarged, out of the funds of the charity, for the reception of boarders; and, for more than a century past, the master and usher have been in the habit of taking boarders from distant parts of the country; and, in order to attract them, they have circulated letters, all over the kingdom, in which they hold out, to parents, the advantages which the school affords, with regard not only to education, but to the exhibitions, scholarships and fellowships annexed to it; and they have permitted their boarders to compete with the boys of the town and parish of *Tiverton*, in the examinations for the exhibitions and scholarships; and, in a great majority of instances, the boarders, owing to the greater attention and favour which the masters shew to them, have been successful. But this is not all: the predecessors of the present master and usher have, in many instances, received payments for boys for whose gratuitous education the school was founded. The result of this system is that, though the town of *Tiverton* alone contains more than ten thousand inhabitants*,

* This, as before noticed, was a mistake; the whole parish, and not the town alone, contained more than ten thousand inhabitants.

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only fifteen boys, who were proper objects of the charity, were being educated at the school when the present information was filed; and, during the preceeding seventy years, the whole number of such scholars was only three hundred and forty-three; but the number of boarders during that period, was one thousand eight hundred and ninety-seven. The practice of taking boarders, always militates against the principle of a free-school; but this Court has sanctioned it, to a certain extent, in cases where it is required to promote the principal object of the founder; as, for instance, when a master of superior attainments is required, but cannot be procured at the salary provided by the endowment. In the present case, that practice, instead of being auxiliary or subordinate to the principal object, has usurped its place. Instead of being only a means of promoting an end, it has become the end itself. The school is the inheritance of the children of *Tiverton* and its neighbourhood; but strangers have gotten in and expelled them from their inheritance. The master and usher, instead of holding themselves satisfied and content with the recompense which the founder provided for their travail, have made the school a school of exaction and a source of great profit to themselves. [The *Vice-Chancellor*.—Do you insist that the practice of taking boarders ought to be wholly abolished?] We do; unless the continuance of it is necessary to afford the master and usher an adequate remuneration; and then we insist that it ought to be limited to the attainment of that object, and that the boarders should be wholly excluded from participating in the exhibitions and scholarships.

There are several cases in which the propriety of admitting boarders into free-schools, has been brought under the consideration of the Court. In the *Attorney*

General v. Lord Clarendon (a), the case of *Harrow* school, the founder had two objects in view, namely, the admission of parish boys and the admission of foreigners. In the course of time, those two objects were found to be incompatible with each other; but, as the founder did not mean to erect a mere parochial school, but had declared that the master might receive, over and above the youth of the inhabitants of the parish, so many foreigners as could be well taught and the place could conveniently contain, and as no attempt had been made to shew that that number had been exceeded, Sir *William Grant* held that it would be inconsistent with the intention of the founder, to exclude or even diminish the number of foreigners. In the present case the evil complained of, arises, not from adhering to, but from violating the intention of the founder. The *Attorney-General v. The Coopers' Company* (b), the *Egham* school case, is almost identical with the present. There a school was founded for teaching the poor children of *Egham*, *gratis*. The master took private pupils, and neglected the parish boys. And Lord *Eldon*, after making, in the course of his judgment, several observations, which are closely applicable to the present case, concluded by declaring that the school was provided for teaching poor children of the parish, *gratis*, and that the master was appointed to teach them *gratis*, and that it was not agreeable to the true intent of the founder, that he should engage in teaching others, or in any other employment which should prevent his giving due or sufficient attention to the teaching of such poor children. That declaration is a precedent for the declaration to be made in the present case. In *The Attorney-General v. Hurtley* (c), the case of *Bingley* school, Lord *Eldon*

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(a) 17 Ves. 491.

(b) 19 Ves. 187.

(c) 2 Jac. & Walk. 353. See 385.

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declared that the taking of boarders by the master of a free grammar-school, was not inconsistent with his duty as such master, *unless it should occasion a breach of duty in the neglect or improper treatment of such boys as were, of right, entitled to be free-scholars in the school, or a prejudice to them.* The taking of boarders, therefore, was to be, altogether, subordinate to the primary object of the charity, and it was not to be continued if the free-scholars were in any manner prejudiced by it. If the doctrine laid down in the two last cases, is applicable to free-schools in general, how much more applicable is it to a case in which the founder has declared most emphatically, that the masters of the school shall hold themselves satisfied and content with the recompense provided for them by his will, without seeking or exacting more, either of parent or children, which procureth favour to givers and the contrary to such as do not or cannot give, his meaning being that it shall be, for ever, a free-school and not a school of exaction. *The Attorney-General v. The Earl of Stamford* (d), the *Manchester* school case, resembles the present in many points. [The learned counsel here read the statement of the case and the judgment at length.] And Lord *Cottenham* declared that no part of the funds of the charity, were, thereafter, to be applied towards paying premiums or exhibitions to boys who were or had been boarders in the houses of any of the masters, except in continuing to pay exhibitions already granted; and that such boarders were not, in future, to derive any benefit from the funds of the charity, in any manner by which the expenditure of such funds might be increased. So that his Lordship allowed the masters to receive boarders but deprived the boarders of the right of competing for the exhibitions. That case was re-heard by Lord *Lynd*

(d) 1 Phill. 737.

hurst; and his Lordship abided, entirely, by the principle of Lord *Cottenham's* decree, but thought that the declaration ought not to be made, without an inquiry as to the restrictions and limitations under which the masters of the school ought to be allowed to receive boarders.

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The main ground on which the Defendants rely in support of the practice of taking boarders, is usage, which, they say, has existed almost ever since the school was established; but the doctrine of this Court is that, whatever is inconsistent with the principle of the foundation of a charity, cannot be sanctioned by usage. We, however, do not object to that practice being continued, provided the number of the boarders is confined within the limits before adverted to, and they are prevented from participating, with the free-scholars, in the exhibitions and scholarships.

The next subject to which we beg to call the attention of the Court, is the expediency of introducing a more extended system of education into the school. It appears, from the evidence, that from the year 1770 down to 1840, the number of free scholars in the school in each year, has been under five, notwithstanding the population of the town of *Tiverton*, exclusive of the parish, (which is very extensive), exceeds ten thousand. Therefore it is but reasonable to conclude that the system of education now pursued in the school, does not answer the requirements of the inhabitants of the town and parish. There are many cases in which this Court has extended the education in grammar-schools, to other subjects than the learned languages; but it is not necessary to refer to them, for the power of the Court so to do, is placed beyond all doubt, by the recent Act of

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the 3 & 4 Vict. c. 77, for improving the condition and extending the benefits of grammar-schools.

The only remaining point, is the election of feoffees in future. With respect to that, we need only refer to the will itself; which directs that, when the number of feoffees is reduced to thirteen, the full number of twenty-five shall be made up out of the heirs of the deceased feoffees, if they be not unfit, and, if any of them be unfit, out of others *near inhabiting*. Similar words occurred in the *Manchester* school case; and Lord *Cottenham* ordered that, in all future elections of trustees, regard should be had to the direction as to near inhabitancy.

The counsel for the Relators, cited the following cases in addition to those before mentioned: *The Attorney-General v. Christchurch* (e), *The Attorney-General v. Lord Mansfield* (f), *The Attorney-General v. Whiteley* (g), *In re Rugby School* (h), *The Attorney-General v. The Haberdashers' Company* (i), *The Attorney-General v. Caius College* (k), *The Attorney-General v. The Governors of Atherstone Free School* (l), *The Attorney-General v. Dixie* (m), *The Attorney-General v. Gascoigne* (n), and *The Attorney-General v. Jackson* (o).

Mr. *Parker* and Mr. *Stinton* for the feoffees.—After the present information was filed, two petitions were presented to the *Lord Chancellor*, one praying that His *Honor's* order of the 4th of June, 1839, might be varied or discharged, or, at least, that all proceedings under it might be stayed, in consequence of the information having been filed; and

(e) Jacob, 474.

(f) 2 Russ. 501.

(g) 11 Ves. 241.

(h) 17 Ves. 505, cited.

(i) 3 Russ. 530.

(k) 3 Keen, 156.

(l) 2 Myl. & Keen, 150.

(m) 2 Myl. & Keen, 342.

(n) Ibid. 647.

(o) 2 Keen, 541.

the other praying that your *Honor's* order of the 14th of February 1840, might be discharged. Those petitions were heard on the 18th of January 1841; when the *Lord Chancellor* refused to discharge or vary the order of the 4th of June 1839, but directed all proceedings under it to be stayed until the hearing of this cause; and he discharged the order of the 14th of February 1840, but reserved the costs of it until the hearing of this cause*. As then the operation of the order of June 1839, has been only suspended, we submit that, if the Relators do not obtain more extensive relief, under this information, than was granted by that order or might be obtained under it, the information must be dismissed, and the Relators must pay the costs of it and also of that petition the costs of which were reserved by the *Lord Chancellor*. Under the order of June 1839, a scheme has been carried in before the *Master*, by the feoffees, (on whose petition that order was made), by which they have proposed that the master's salary should be increased from 60*l.* a year, its present amount, to 200*l.* a year, and the usher's, from 20*l.* a year, its present amount, to 100*l.* a year; and that, in future, native boys, as well as foreigners duly admitted, shall receive instruction without any payment being made for it; and that the latter shall be admitted into the school, and the sums for binding poor boys to serve in husbandry, be disbursed with the assent and allowance of such ten householders of the town as shall be assessed, the most highly, to the assessed taxes. We submit that no more extensive alterations in the mode in which this school has been conducted, are required. [The *Vice-Chancellor*.—The scheme proposes that the salaries of the master and usher should be increased, and

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* A report of those petitions and of the order made upon them, is given, *post*, pp. 253 *et seq.*

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that they should receive nothing for tuition; but it does not say anything about their discontinuing to take boarders.] It does not. The masters have received boarders from a very early period; almost ever since the school was opened; and, if they were now to be prohibited from doing so, the only consequence would be that boarding-houses would be opened by persons living in the town. [The *Vice-Chancellor*.—According to the evidence of one of your witnesses, it seems reasonable to conclude that the very first master that was appointed, took one boarder at least.]

There is no foundation for the assertion that the inhabitants of *Tiverton* have been deprived of the benefit of the school; for it appears, from the register of the school, that, since the year 1770, two thousand two hundred and forty boys have been educated at the school; that three hundred and forty-three of them were either born, or for the most part, before the age of six years, brought up in the town or the parish of *Tiverton*, and that they have obtained one-third of the exhibitions; and there is no instance of a boy who was entitled to be admitted to the school, as a free-scholar, having been rejected. It is certainly true that the testator intended boys who might happen to be born, or for the most part, before the age of six, brought up in the town or the parish, to be benefited, in the first instance, by his foundation; but he intended also that a class of persons, whom he calls foreigners or the children of foreigners, should participate in the benefits of it. In that respect, also, his intention has been fulfilled; for there always has been a number of foreigners at the school. The trustees have answered all the objects of the charity and made a considerable saving out of an income which, when the information of 1740 was filed, amounted only to 177*l.*, and which, now, amounts to but little more

than 1000 *l.* a year. The masters of the school have been always men of high attainments; but what would they have been if, in 1740, they had been prevented from taking boarders and the pittances of 60 *l.* a year and 20 *l.* a year, had been the only emoluments they derived from the school. Even the present income of the charity property, will not allow of higher stipends being paid to the master and usher, than 200 *l.* a year to the former, and 100 *l.* a year to the latter; and those sums are not sufficient to command the services of men distinguished, as the masters of this school always have been, for their learning and abilities. It was said, by the counsel for the Relators, that, by the term, "foreigners," the testator, in that part of his will which relates to the school, meant boys born in the parishes adjacent to *Tiverton*; but there is nothing to shew that, by that term, he meant anything more than boys who were not born in the town or the parish of *Tiverton*, nor, for the most part, before the age of six years, brought up there. If he had intended to put a restriction on that term, he would have done so; for he has put a restriction on it, in that part of his will where he speaks of the foreigners who were to be bound to serve in husbandry. The assent and allowance of ten householders was required to be given before a foreigner could be admitted into the school, in order that it might be ascertained that there was no town or parish boy to fill the vacancy. The testator also prescribes that a selection shall be made with regard to the foreigners; but he does not say, distinctly, by whom that selection is to be made. He says: "And my meaning and desire is that they, from time to time, will make choice of the children of such foreigners as are of honest reputation and fear God, without regarding the rich above or more than the poor." [*The Vice-Chancellor*.—According to the grammatical construction of that sentence, "they," means the householders;

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but it is pretty plain that the testator did not mean that there should be a choice, and that that choice should be limited to assent. Therefore, I rather think that the best construction is that *the choice* should be in the trustees.] It is not even suggested that any native boy has been refused admittance to the school, or that any improper foreign boy has been selected. The testator clearly intended that the rich, as well as the poor, should be educated at the school; for he says: "without regarding the rich above or more than the poor;" that is, the rich were not to be preferred to the poor. Therefore, to exclude the children of the rich entirely, would be a departure from his intention.

It was contended that the very particular directions which the testator gives respecting the buildings to be erected after his decease, shew that he meant the school to be merely a day-school: but it is impossible to suppose that the hall, buttery and kitchen, with the rooms over them, were intended, merely, for the accommodation of the master and usher, and for the boys who might come from a distance, to take their meals in. If that were so, where, it may be asked, were the foreign boys to sleep? Why were the windows to be barred? The architects whom we have examined, say that the chamber over the hall, which is thirty-five feet in length and twenty-three feet in breadth, together with a chamber over the porch, which is about twelve feet square, are part of the original building, and were designed for dormitories, and would contain about thirty boys. The buildings, therefore, as well as the usage, which, as appears from the records of the school, is nearly if not quite coeval with the existence of the school, shew that the testator intended boarders to be taken; and, that being so, the Relators can have no right to object to their being allowed to compete with the native boys in the examinations for

exhibitions and scholarships. Besides, a boy, by becoming a boarder, does not, necessarily, cease to be a free-scholar; and, if the master and usher were to be prohibited from taking boarders, foreigners would still resort to the school and be candidates for the exhibitions and scholarships; for they would find board and lodging in the town. It was said that the townspeople are deterred from sending their children to the school, because the master and usher show partiality to the boarders; but our evidence not only contradicts that assertion, but proves that there is a marked preference given to the native boys over the boarders; and that, since the year 1770, one hundred and twenty-three native boys and seven hundred and ninety-two foreigners have stood for exhibitions and scholarships, and that a much larger proportion of the former than of the latter, has been elected.

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When the authorities relating to grammar-schools are considered, it will be seen that this Court has gone far beyond what has been done in the present case, even if we were not in a position to shew that every thing that has been done is within the letter of the testator's expressed intention. The *Harrow* school case was very similar to the present. There the school was founded for the education of the youth and children of the parish; but the master was to be at liberty to receive others. The parish children, however, were the primary objects of the foundation. The information in that case, brought forward grounds of complaint which are very similar to those now before your *Honor*; namely, that five out of the six governors, were not resident in the parish; that they had not been duly appointed; that large sums had been laid out in repairing and decorating the master's house, and in enlarging it for the reception of boarders, who were taken in by him, as foreigners, to be educated at the school and to the pre-

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judice of the children of the poor inhabitants; that few or none of the children of the inhabitants, for whose benefit the school was originally instituted, had been educated there; for, though the master and governors did not actually refuse to admit such children when offered, yet, by taking into the school so many foreigners, to the amount of two hundred and fifty or more, who were, chiefly, the sons of the nobility and gentry of the kingdom, they rendered it impossible for such poor children to remain in the school; being scoffed at and ill-treated by the other boys: and that, by the rules and orders of the charity, the masters were permitted to take into the school so many foreigners only as could be taught without prejudice or neglect of the children of the poor inhabitants of the parish; for whose direct and more immediate benefit the school was founded. Sir *William Grant* dealt with that case in this manner: He held that, as the governors were a corporation, the Court had no jurisdiction to remove any of them; and, after asking whether the parish itself would gain by the conversion of the school into a mere parish school, and observing that no man of talents could be found to fill the place of master at the salary provided by the founder, (which was only 20*l.* a year), he refused to put any restriction on the number of scholars who were not parish boys, except that which the founder himself had prescribed. In the *Rugby* school case, the school was founded for the children of *Rugby* and *Brownsover* and other places within a certain distance of *Rugby*; but, in process of time, it became a great public school; and the boys who paid for their education, greatly outnumbered those on the foundation. A scheme was laid before one of the *Masters* of this Court, by which it was proposed to lay out several thousand pounds in rebuilding the schoolmaster's house, with proper accommodation for his boarders. The *Master* disapproved

of the scheme, on the ground that the house and buildings were calculated for receiving boys of a different description and for a different education than were intended by the founder. The *Lord Chancellor*, however, on a petition being presented to him by the trustees of the school, ordered that they should be at liberty to carry the scheme into effect, and to raise 14,000*l.* for the purposes of it. Therefore, as Sir *William Grant* observes, it was obvious that the *Lord Chancellor* did not conceive an expenditure to be improper, which tended to the general advantage of the school, merely because it was not calculated for the direct and immediate benefit of the boys on the foundation. The result of those two cases is that the Court, having regard to the interests of the parish of *Harrow* in the one, and to the interests of the town of *Rugby* in the other, and of the boys who were the objects of the foundations, sanctioned the practice of taking boarders and a large expenditure of the funds of the charities in providing for their accommodation, notwithstanding the boarders were not on the foundations. But in the present case, every boarder, according to the scheme which has been submitted to the *Master* under the order of June 1839, will be on the foundation, and one of the objects whom the founder intended to have the benefit of his school. The case of the *Attorney-General v. Hartley*, related to a school founded for teaching grammar in the town of *Bingley*; and the rents of the charity-estates were directed to be applied for the maintenance of a school-master or to such other godly uses, as should be thought most meet, for the good and common profit of the town and parish of *Bingley*, and to no other use, intent or purpose whatsoever. Consequently, no foreigners were to be admitted to the school. The master, however, had been in the practice of taking foreigners as

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boarders; and, Lord *Eldon* sanctioned that practice notwithstanding the express directions contained in the instrument by which the school was founded, and notwithstanding the information complained that the taking of boarders was prejudicial to the free-scholars, or grounds very similar to those in the present case. The *Attorney-General v. Christchurch*, was also a case relating to a school founded for educating the children of a particular town, exclusively; but Sir *Thomas Plume* said, with regard to the practice of taking boarders from other localities: "When the number of free-scholars is ascertained, I think all the cases authorize the Court in saying that the schoolmaster may unite, with the gratuitous education of those scholars, another object not necessarily incompatible with it, namely, stipendiary education of others. It is true that many arguments may be urged against it, on the ground of one object tending to relax the exertions of the master on the other. But still it is to be remembered that, by offering greater emoluments, you obtain a more competent master, better able to instruct those who are taught gratuitously; and it is evident, from what we see in the public schools, that eleemosynary and stipendiary education may be combined, to the great advantage of both. Attention must always be paid to the school, to see that the master does his duty to the free-scholars. The trustees must take care that he does not neglect them for the sake of attending to the boarders." The *Attorney-General v. The Coopers' Company* is not at all applicable to the present. That was a case of gross abuse: the master took private pupils and wholly neglected the poor boys who were the sole objects of the charity. The case of the *Attorney-General v. Lord Stamford*, is also plainly distinguishable from the present. There the school was founded in the populous

town of *Manchester*; and, therefore, there could be no doubt that, if it were properly conducted, a number of boys quite sufficient to occupy the master's attention, would resort to it; besides which the income of the charity property was very large, and the master's salary was 600 *l.* a year. Moreover, the statutes of the school expressly prohibited the scholars from taking their meals in the school, and contained other provisions* which were inconsistent with the taking of boarders. Nevertheless Lord *Cottenham* did not think it right to put a stop to the practice, but declared, merely, that, for the future, the boarders should not receive any of the premiums or exhibitions, or derive any other benefit from the funds of the charity. But Lord *Lyndhurst*, by whom that cause was reheard, thought that declaration ought not to be made without further inquiry; and, therefore, instead of it, he directed the *Master* to inquire under what restrictions and subject to what limitations the masters should be allowed to receive boarders into their houses.

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In the *Attorney-General v. Hartley*, the *Attorney-General v. Christ Church*, and the *Rugby* school case, the foundations were limited†; and, therefore, there was some ground for the argument that the admission of boys who were not objects of the charities, was an invasion of the rights of the free-scholars. The Court, however, did not allow that argument to prevail. Consequently, if this school were full, if there were one hundred and fifty boys on the foundation, those cases would be authorities for allowing the master and usher

* When the *Attorney-General v. Decon* was argued, Mr. *Phillips's* report of the *Attorney-General v. Lord Stamford* was not published. Mr. *Parker* read a MS. report of that case.

† The foundations in those cases were limited as to locality, but not as to number.

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to take, as boarders or paying-scholars, supernumeraries beyond the one hundred and fifty; provided the rights of the free-scholars were not prejudiced by it. In the *Attorney-General v. Lord Stamford*, Lord *Cottenham's* decree did not go the length of prohibiting the master from taking boarders; notwithstanding the populousness of the town of *Manchester*, the largeness of the master's salary, and the express provisions, in the statutes, that the boys should not take their meals in the school and that the master and usher should teach, freely and indifferently, every child and scholar coming to the school, without any money or other reward whatsoever, except only their stipends. All that his Lordship ordered with respect to the boarders, was that they should not derive any benefit from the funds of the charity; and Lord *Lyndhurst* altered that part of the decree. In the present case, the will, itself, shews that the testator intended the master to take boarders; and, instead of his having an ample salary, he has hitherto received only 60*l.* a year, and the funds of the charity will not allow of its being increased beyond 200*l.* a year: but, even that sum, will not command the services of gentlemen possessing the high qualifications which the masters of this school have always enjoyed, and which have raised it to its present eminence.

The point next to be considered, is the propriety of extending the system of education in the school, to other matters than the Latin and Greek languages. [The *Vice-Chancellor*.—*Robert Chilcott**, who was a trustee

* This gentleman, by his will dated the 25th of August, 1609, founded a free-school in *Tiverton*, for teaching boys born in the town or the parish to read and write, and directed that, if there should not be sufficient to make up that number, the deficiency should be supplied by foreigners.

and legatee under Mr. *Blundell's* will, and, also, nephew and clerk to him, appears to have founded his school, in order that it might be subservient to his master's school.] Yes; and the young children of *Tiverton* are now being instructed, in his school, in many of those miscellaneous branches of education, which the witnesses in support of the information wish to be introduced into *Blundell's* school.

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The counsel for the Relators being aware that the object which their clients have in view, could not be effected consistently with the principle on which this Court interferes in the regulation of grammar-schools, have referred your *Honor* to the 3rd and 4th Vict. c. 77. Now the first section of that act does not enjoin or direct courts of equity to extend the system of education in grammar-schools, but only empowers them to make decrees or orders for that purpose, if they shall think fit; and, if they do think fit, the act prescribes that they shall have due regard to the intentions of the respective founders and benefactors. Then the second section (every line of which is applicable to *Tiverton* school) enacts that, in making a decree or order for the above-mentioned purpose, the Court shall consider and have regard, not only to the intentions of the founders and benefactors of the school, but to the nature and extent of the foundation and endowment, the rights of parties interested therein, the statutes by which the same has been hitherto governed, the character of the instruction theretofore afforded therein, and the existing state and condition of the school, and also the condition, rank and number of the children entitled to and capable of enjoying the privilege of the school, and of those who may become so capable, if any extended or different system of education, or any extension of the right of ad-

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mission to the said school, or any new statutes shall be established. Now, as to the intentions of the founder in this case, there can be no doubt. His will directs that the school shall be a grammar-school, and that, for the increase of good and godly preachers of the gospel, his executors shall disburse 2,000*l.* in founding scholarships in the Universities of *Oxford* and *Cambridge*, and that scholars from his school shall be elected to them. Therefore it is evident that he intended his school to be one which would qualify young men for the Universities: and *J. Ham*, and *B. Gilbert*, and other benefactors, have made bequests, either in augmentation of the funds of the school as a grammar-school, or to found scholarships and fellowships in the Universities for the young men who should receive their education at it. Therefore, if the Court has regard to the intentions of the founder and benefactors, it cannot convert the school into a place of mere commercial education. The second point which the act requires the Court to have regard to, is the nature and extent of the endowment. The meaning of that is that the Court is not to extend the system of education, unless it finds that the school is in possession of funds, which are amply sufficient for that as well as the primary purpose—the education of the scholars in the learned languages. In the present case the endowment is not sufficient to allow the master a larger salary than 200*l.* a year, and, therefore, it is impossible for the Court to divert any portion of it to the extension of the system of education.—Thirdly, the Court is to have regard to the statutes by which the school has been hitherto governed. Under *Blundell's* will, the feoffees have power to make statutes, ordinances, and regulations for the government of the school, provided they are consistent with his expressed intentions; and they have thought fit to govern and maintain it, as a grammar-school, ever

since it was established.—Fourthly, the Court is to have regard to the character of the instruction previously afforded in the school, and the existing state and condition of it. That provision, no doubt, has reference to cases like the *Attorney-General v. Lord Mansfield*, where the school, though intended, by the founder, to be a grammar-school, had been used, as far back as living memory could reach, as a place for teaching English, writing and arithmetic. But, when the school is, and, ever since its first establishment, has been conducted, as is the case here, in strict conformity to the founder's intention, the act of Parliament does not empower the Court to alter the system of education pursued in it.—Fifthly, the Court is to have regard to the condition, rank and number of the children entitled to, and capable of enjoying the privilege of the school. Now the children who are entitled to the privilege of this school are, first, the children born, or, for the most part, before their age of six years, brought up in the town or parish of *Tiverton*, and, secondly, the children of foreigners; but no one under a grammar-scholar, whether a native or a foreigner, is entitled to the privilege of the school.—This Court cannot violate the right of the children of foreigners, as it would do if it were to extend the system of education in the school, and make it a place of commercial education for the children of *Tiverton*, whether grammar-scholars or not.

The third section of the act limits the power of the Court more than the second does. It provides that, unless it shall be found necessary from the insufficiency of the revenues of any grammar-school, nothing in the act contained shall be construed as authorizing the Court to dispense with the teaching of Latin and Greek, or to

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treat such instruction otherwise than as the principal object of the foundation. The revenues of this school are not insufficient to maintain the school as a grammar-school; but they are wholly inadequate to extend the system of education in the manner proposed by the Relators, and to retain, at the same time, the teaching of Latin and Greek as the principal object.

Then the fourth section enacts that, in extending as thereinbefore provided, the system of education or the right of admission into any grammar-school in which the teaching of Latin and Greek shall be still retained, the Court shall not allow of the admission of children of an earlier age or of less proficiency than may be required by the foundation. Here the will of the founder requires that no child under a grammar-scholar, shall be admitted into the school. Therefore no child of less proficiency than that of a grammar-scholar, can be admitted. [The *Vice-Chancellor*.—The direction is that no boy under the age of six years, and none under a grammar-scholar, shall be admitted. That direction seems to amount to this; that no boy shall be admitted who has not acquired a knowledge of writing and of the elements of arithmetic.] No doubt. The boy must have received his elementary education before he can be admitted into the school. *Chilcott's* school is still in existence and in a flourishing state; and as reading, writing, arithmetic, English grammar, geography, book-keeping, mensuration and land-surveying are taught there, the proposed extension of the subjects of education in *Blundell's* school, is as unnecessary as it is inconsistent with the purposes for which he founded his school.

Another prominent object of this information, is the

removal of such of the feoffees as reside at a distance from *Tiverton*; and the Court has been asked to make residence at *Tiverton* a necessary qualification for every future feoffee. But the testator has imposed no such restriction. All that he has said upon that subject, is that when the number of feoffees shall be reduced to thirteen, a sufficient number of new feoffees to make up twenty-five, shall be chosen from the heirs of the deceased feoffees, and, if they be unfit, then from others near inhabiting: and, in modern times, if not from the commencement of the school, whenever a feoffee has died, his heir, or at least a member of his family, has been chosen to supply his place; and there is no instance of any gentleman having been selected, who was not resident in one or other of the adjoining counties of *Devon* and *Somerset*. [The *Vice-Chancellor*.—One does not see why residence in *Tiverton* should be requisite in the new feoffees more than it was in those appointed by the testator himself. The Chief Justice of England must have been frequently absent from *Tiverton*, if he ever resided there.] It appears, from the evidence, that the Chief Justice resided at *Wellington* in *Somersetshire*, that *Chilcott* resided in *London*, and that six others of the original feoffees, resided at considerable distances from *Tiverton*: and the allegations in the information that the feoffees who reside at a distance from *Tiverton*, are unable to attend, properly, to their duties, and that much inconvenience has arisen from the difficulty of assembling a sufficient number of the feoffees, are most positively and circumstantially denied, and are wholly unsupported by evidence. The two feoffees who are said to be abroad, were residing near *Tiverton* when they were appointed; and both of them are now dead: so that that ground of cavil is removed. The charity estates have been always

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let either by auction or by tender, and have been most successfully managed.

The information also asks for an inquiry to ascertain what the charity property consists of. But that is wholly unnecessary. The particulars of the real estates are set forth in the schedule to the *Master's* report in the cause instituted in 1734, and the funded property consists of 2,000*l.* Consols and 1,845*l.* 18*s.* South Sea Annuities, the one being *Gilbert's* and the other *Ham's* benefaction. In addition to which, one of the admissions in the cause, is that the account of the income and expenditure of the charity contained in the books marked C. and D., (which go back to the year 1604), is correct.

The learned counsel then read the evidence of several witnesses who had been free-scholars at the school, all of whom deposed that the master and usher had acted impartially, between them and the boarders, in every respect, and that they had been kindly treated by the boarders: and they concluded by submitting that all the matters as to which the decree of the Court was sought, were either unsupported by evidence or within the scope of his *Honor's* order of June 1839, and, therefore, that the information ought to be dismissed with costs.

Mr. *Rolt* and Mr. *Roundell Palmer*, for the master and usher, enforced the argument for the feoffees.

Mr. *Bethell* replied.

The VICE-CHANCELLOR:

In determining the questions that have been raised in

this case, I shall be guided by the principle laid down by Lord *Cottenham*, when the petition relating to this charity was heard by him in the year 1841. His Lordship, when he gave his judgment upon the matters connected with this case which were then brought before him, expressly referred to the principle which he had laid down in the *Manchester* school case. What had taken place in that case was, in a great degree, new to me; and, therefore, I felt it to be my duty to study, with the greatest attention, what had taken place in that case, so far as it appeared from the judgment which had been given, first of all, by Lord *Cottenham*, and, subsequently, by Lord *Lyndhurst*, when the case was brought before him on appeal. It is perfectly true that there was some difference of opinion, between those noble and learned lords, as to some part of the case; but there was no difference between them with respect to the great and important question, as to what should be the rule on which the decision should turn: because Lord *Cottenham*, in giving his judgment, rested himself upon the statutes of the school; and, when Lord *Lyndhurst*, upon the appeal, thought it right to vary the decree in one respect, he varied it because he thought there was a portion of the statutes which made it right for him so to vary it. Lord *Cottenham* certainly entertained the opinion that, according to the true construction of those statutes, boarders ought not to be admitted. Lord *Lyndhurst*, when the case was brought before him, adverted to that most remarkable language which is contained in the last clause of the statutes, which gives a power to the trustees to augment, to expound and to reform the statutes; and he thought that, although there had never been any express alteration, in the form of a written rule or order, yet, inasmuch as the fact of taking boarders must have come within the

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cognizance of those trustees who had power to vary statutes, and as they had permitted the practice to continue, that circumstance must be taken as equivalent to an alteration of the statutes in this respect; and, even with that, he did not, at once, come to the conclusion that there should be boarders. He referred it to the *Master* to consider under what restrictions and limitations it would be right that the practice should be continued. However, this principle may be clearly deduced from the two judgments of the learned Lords taken together, namely, that, in the present, it is the duty of the Court, for the purpose of ascertaining what shall be the rule to guide its decision, to look at the founder's statutes.

The great question in this cause is whether boarders shall be continued at this school at *Tiverton*; and for the purpose of determining that question, I shall look to the will of the founder, and point out what appears to me to be the clear construction of it. A great part of the will is occupied with matter which has no relation to the subject; several legacies are given, some to individuals and others to companies in *London*; and then the will proceeds thus: "I will that my executors, or the survivors of them, by the advice and directions of my overseers and of the survivors of them, with all convenient speed, upon a fit and convenient plot and piece of ground in *Tiverton* aforesaid, by my executors for that purpose purchased and procured, shall erect and build," &c. buildings, which he particularly describes, which shall be a school of a certain length and breadth, and a buttery and kitchen, with rooms over them. Some particular directions are given as to the construction of the rooms; they are to have chimneys and so on; and he directs, generally, that the master shall have the

the rooms, but the use of one of them in particular is given to the usher. Then he directs that a sum of 2,400 *l.* shall be laid out in erecting those buildings; and, having done that, he says: "Item, my will and meaning is that, in the said school, shall not be taught above the number of 150 scholars at any one time, and those, from time to time, to be of children born, or, for the most part, before their age of six years, brought up in the town or parish of *Tiverton*; and, if the same number be not filled up, my will is that the want shall be supplied with the children of foreigners, and those foreigners only to be received and admitted, from time to time, for ever, with the assent and allowance of such ten householders."

I stop here for the purpose of making this observation,—that the language of this gentleman is certainly very obscure; because, here he has used the term "foreigners," as applicable both to the children and to the parents of the children; but I think it is reasonably evident, on the face of the will, that, by the expression, "children of foreigners and those foreigners only," he did mean to describe, not so much the children of foreigners, that is, of people not belonging to *Tiverton*, but children who bore a contradistinction from those first named, which children first named are children born in the town or parish of *Tiverton*; or, for the most part, before their age of six years, brought up there. Consequently, if none of those could be supplied or not a sufficient number, then the testator means to say that children who were not born in the parish of *Tiverton*, and not, before their age of six years, for the most part, brought up there, should be eligible. That, therefore, will be a general description of any children, other than those who are first marked as the objects of selection.

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Then, he says: "And those foreigners only to received and admitted, from time to time for ever, w the assent and allowance of such ten householders the said town of *Tiverton* aforesaid as, for the time bei shall be most in the subsidy-books of our sovereign la the Queen's Majesty and of her successors for ever, a not otherwise. And my meaning and desire is that th from time to time, will make choice of the children such foreigners as are of honest reputation and fear G without regarding the rich above or more than the po and that there shall be no scholar be or continue in t said school as a scholar, but boys, and none above t age of eighteen years or under the age of six years, a none under a grammar-scholar." Then he directs th the master shall have, yearly for ever, 50 *l.*, to be p quarterly, and the usher, twenty marks, to be paid like manner, quarterly. Then he adds these empha words: "And my hope and desire and will is that th hold themselves satisfied and content with that reco pense for their travail, without seeking or exacting a more, either from parent or children, which procure favour to givers and the contrary to such as do not cannot give; for my meaning is, it shall be for ever free-school and not a school of exaction*." Now t language used in the statutes of *Manchester* school, reference to the same subject, is, "without any mon or other reward;" and it is remarkable that the expri sion, "and not a school of exaction," is found in t first of the statutes of *Eton College*, where the roy founder, speaking of the master, says: "*Nec non uni magistri sive informatoris in grammaticâ, qui dictos in*

* The counsel for the master and usher said that th clause prohibited the taking of money for travail *in teachin* but not for board and lodging; the doing of which could n be termed *exaction*.

gentes scholares aliosque quoscunque, et undecunque de Regno Nostro Angliæ ad dictum collegium confluentes, in rudimentis grammaticæ, gratis, absque pecuniâ aut alterius rei exactione, debeat informare." There is no ambiguity upon the words themselves. The only question would be, if it could be a question at all, whether the taking of boarders was comprehended within those words; but it seems to me that, if it is once said that the school shall be, for ever, a free-school and not a school of exaction, and that the masters shall teach without seeking or exacting any more than their salaries, either from parent or children, which procureth favour to the giver, and the contrary to such as do not give, it is most manifest that boarders must be excluded; because you cannot conceive any system of keeping boarders carried on by the master and usher, which will not bring to the master and usher, other profit than that which would be derived, merely, from their salaries; and, however difficult it may be to estimate the exact profit, certain it is that the boarders would not be kept unless a profit were yielded; and, therefore, whether from the boarders or their parents, something would be abstracted in the shape of an exaction or demand, *ultrâ* that with which the founder intended the master and the usher should be content. And as it was the clear opinion (as it unquestionably was) both of Lord *Cottenham* and of Lord *Lyndhurst*, that the words to which I have just referred in the statutes of *Manchester* school: "without money or reward," would forbid boarders, it follows, as a necessary conclusion, that the words in this will, which are more explicit, must have the same effect given to them; and, therefore, I must take it as a rule laid down by the founder, that boarders should not be taken.

I do not think that any such answer to that position

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can be suggested by anything contained in Mr. *Blandell's* will, as was afforded to the understanding of Lord *Lyndhurst*, by the final words which are found in the statutes of *Manchester* school; because there is nothing in the words which are contained in this will, as to the dealing with the charity, which is at all analogous to, or equally forcible with the words which are found in the *Manchester* statutes.

Then the testator, after giving certain directions about the matters of husbandry, says that the trustees shall establish and set down such orders, laws, and directions, both touching the school and matters of husbandry, and all matters and circumstances thereof, and touching all parties to be interested therein or to have anything to do about the same, as to them, or the most part of them, for the time being, shall be thought meet for the governance, maintenance and continuance thereof, according to his true intent and meaning; and that the schoolmaster and usher for the time being shall be elected, nominated, appointed, displaced and removed by the feoffees for the time being, for ever, or the most part of them, having always the approbation and allowance of the Ordinary of the diocese of *Devon* to the said election. It is plain, therefore, that he did mean to give to the trustees, subject only to one control, the absolute power of displacing the master and usher; but, where he gives them the power to make such orders, laws and directions, both touching the school and matters of husbandry, he says: "as shall be thought meet for the governance, maintenance and continuance thereof, according to my true intent and meaning." And, therefore, what he meant, was that they should make, from time to time, such rules and orders as should be according to his true intent and meaning, but not such

rules and orders as should directly contravene and subvert his true intent and meaning. Therefore, though I have the strongest wish that such a noble institution as *Blundell's* school has been and is, should be preserved, and though there is a great deal of evidence given, by very sensible persons, (who might be very good judges of the matter as a matter of speculation), with a view to shew that boarders should be continued, I find myself bound, by the imperious and positive language of the founder, to say that boarders cannot be continued; and, if the result should be detrimental to the school, Parliament must interfere. It appears to me, therefore, upon the best consideration that I can give to the subject, that there ought not to be boarders.

I shall now make an observation with respect to the admission of foreigners; for I consider that I have sufficiently defined who are foreigners. The testator certainly meant that, when there was a deficiency of boys of the first class to make up 150, boys of the substituted class should be chosen by the trustees; but: "with the assent and allowance of such ten householders of the said town of *Tiverton*, as for the time being shall be most in the subsidy-books of our sovereign lady the Queen's Majesty and of her successors for ever." Subsidy-books have gone out of use; and, for a long while, there has been no such collection of ten householders to give an assent, as was contemplated by the testator. But the trustees have pursued this course: they elected foreigners on a deficiency of native boys; and, when exhibitions were to be granted to the foreigners, they required that there should be (I can hardly characterize it as anything else) that whimsical form of exhibiting a shadow, which is detailed, at length, in the information and in one of the exhibits, but which is not

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such a thing as the Court can allow to continue a substitute for that which the testator himself has prescribed as something absolutely necessary in order to carry into effect the election of the foreigner at the time when he is first admitted into the school. Therefore must be referred to the *Master*, to state what shall be the qualification of the ten householders, whose assent and allowance is to be given in future, before a foreign boy can be admitted into the school, having regard to the testator's will. Of course, I do not, at present restrict the *Master* in any view he may take; but I say thus much, that it does not appear to me that the scheme, as to the selection of the ten householders which was proposed by the trustees, is at all a scheme which was commensurate with what the testator meant because, what a man expends is hardly a proof of what he has; and it is plain that the testator meant that those who appeared to be the most wealthy should be the persons in whom the assent and allowance should rest; and, therefore, it may be a matter for the *Master* to consider, whether actual revenue, which may be ascertained by certain public books, may not be taken into consideration, as well as the amount of taxes which a gentleman may happen to pay in *Tiverton*. I do not mention this, because it struck me that it might be advisable for the Court to mention anything which might tend to enlarge the views of the parties, or of the *Master* when he is considering the subject; but, of course, it does not bind him.

The next question which has been raised, (raised, indeed, but faintly), is whether this school is to be considered as a grammar-school: I allude to observations which are fresh in my mind, (because I very recently read them all over,) which Mr. *Bethell* made on the

part of the subject. There can, I think, be no doubt that, by a grammar-school, the testator meant a school in which Latin and Greek should be taught: and that such was his meaning is made still more evident by this circumstance; that, in the subsequent part of his will, he speaks of the students in Divinity, who, after the first six, (who, of necessity, were to be named without reference to the school) should be supplied by scholars from the school. But there could be no such thing as a scholar fit to be a student in Divinity, who had not been taught both Latin and Greek at the least. I do not think that there is any difficulty about that: and taking it for granted, therefore, that the school is a grammar-school within the meaning of the recent act of Parliament, I see no reason why there should not be a scheme for the purpose of extending the instruction in the school to other subjects than Latin and Greek, provided only there is such a surplus income as will pay the necessary expenses of so doing.

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The preamble of the first section of the act, after taking notice of the construction that has been put, by courts of equity, on the word grammar, gives a general direction that there may be some other system of education directed by the Court; the words of which seem to have been purposely copied into the prayer of the information. The enacting part of that section is: "that it shall be lawful for the Court to make such decrees or orders as to the said Court shall seem expedient, as well as for extending the system of education to other useful branches of literature and science, in addition to, or (subject to the provisions hereinafter contained), in lieu of the Greek and Latin languages, or such other instruction as may be required." And then the act has introduced certain limitations in some of

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the following sections. It has enacted, in the second section, that, in making any such decree or order, the Court shall consider and have regard to the intention of the founders and benefactors of every such grammar school, the nature and extent of the foundation and endowment, the rights of parties interested therein, the statutes by which the same has been hitherto governed, the character of the instruction theretofore afforded therein, and the existing state and condition of the school, and also the condition, rank and number of the children entitled to and capable of enjoying the privilege of the school. And then it enacts, in the third section: "that unless it shall be found necessary, from the insufficiency of the revenues of any grammar-school, nothing in the act contained shall be construed as authorizing the Court to dispense with the teaching of Latin and Greek or either of such languages now required to be taught, or to treat such instruction otherwise than as the principal object of the foundation." The fourth section is "that, in extending, as hereinbefore provided, the system of education or the right of admission into any grammar school in which the teaching of Greek and Latin shall be still retained, the Court shall not allow of the admission of children of an earlier age or of less proficiency than may be required by the foundation or existing statutes, or may be necessary to shew that the children are of capacity to profit by the kind of education designed by the founder." I advert to this section particularly, because I observe that what is really sought by the *Attorney-General* and the Relators, in this information, is only that the surplus shall be so applied, and I do not observe that there is any attempt made, or any desire expressed by any one, in the slightest degree, that the fundamental rules of admission into the school shall be, in the least, varied. Those rules are expressed, in

the founder, in language so clear, that there cannot be any doubt respecting them; for, independently of the question of natives and foreigners, which I have treated of, the rule which he lays down, is that there shall be no boys in the school under the age of six, or under a grammar-scholar, or above the age of eighteen. Those are his directions; and it is quite plain, therefore, that he did, himself, require some degree of proficiency or ability, even in the youngest child that might be brought forward as a candidate for admission into the school; for if the child be only six years old, he must not be under a grammar-scholar, that is, he must have received such necessary elementary instruction, as will enable him to receive the higher instruction which is to be given by the master of a grammar-school. There may be some difficulty about ascertaining it, but it is perfectly plain that some proficiency is necessary, and some ability must be exhibited: and I mention this the more particularly, because I see, in the evidence which was given on the part of the Relators, that a great number of the witnesses have strained their minds to shew that there is a sort of hardship inflicted on the people of *Tiverton*, who may be in such poor circumstances of life as not to be able to give even that preliminary education which would enable boys to be up to grammar-scholars at a very early and tender age. The witnesses to whom I allude, seem to have entertained the mistaken notion that, in the administration of this most valuable charity, the Court might be induced to think that it would be a right thing not to attend to the plain instructions of the testator, but to disregard them altogether, and make the school, which has flourished so much and produced men of such celebrity, a sort of village school, or, to use the language which we see so much in the neighbourhood of the metropolis, a mere commercial academy. The

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Court has no power to do so; and my opinion is that, according to any view of the testator's will, those who mean their boys to have even such collateral advantages as may be derived from the extension of the system of education in the school, must take care that their boys, when admitted, shall not be under grammar-scholars.

It is quite impossible, also, to make any such direction as is glanced at by the witnesses on the part of the Relators, namely, to equalize, as it were, the boys at first admission. The witnesses take notice that it is a sort of hardship that the children of persons more affluent than the inhabitants of *Tiverton* or some of them, (for some of them seem to be affluent), are brought forward in a degree in which the children of the poorer inhabitants of *Tiverton* cannot be brought forward. That is accidental; it cannot be helped; and it never can be right that there should be a sort of equalizing rule which shall say that all the boys shall come equally well informed; that is impossible; it may be as well said that there should be a rule that they should all have equal ability; that too is impossible. Ability is the gift of Providence, which the child receives at its birth; and the subsequent advantage of better tuition is a mere accidental circumstance, over which the Court has no control; and as to which, the testator did not intend that any control should be exercised.

However, it seems to me to be quite consistent both with the law laid down in the act of Parliament, and with the wishes of the parties (and, I may say with the proposal of the trustees in the amended scheme which they carried in under the petition heard in the year 1839), that the instruction given in the school should not be confined to the learned languages. If there

remained any doubt upon that subject, it is completely removed by Mr. *Almond's* evidence, who was examined in chief by both parties. He is a man on whom I should be disposed to place the greatest reliance, not only because he has been examined by both parties; not merely because he has been educated at *Cambridge*; but because he has, for some years, filled the situation of mathematical tutor at this very school, and also, more lately, the situation of classical tutor at the same school. He says: "that he has become acquainted with the system of education pursued in *Blundell's* school, by having been mathematical tutor and assistant classical tutor in the school, from the year 1838 to the present time; and that he believes it would be for the benefit of the inhabitants of the town and parish of *Tiverton*, that the system of education in the school should be extended to other branches of education, besides instruction in Latin and Greek, namely, to mathematics and other sciences, and one or more of the living languages. A great number of the witnesses have spoken, in the wildest manner, of the modern languages which they propose to be taught; but any such extension as they suggest, is perfectly fanciful: one or two, with greater wisdom, have limited them to French and German, which is reasonable enough. Mr. *Almond* then states, as the reason for his belief that the inhabitants of *Tiverton* would be benefited by the introduction of a more extensive system of education into the school, that it would enable them to complete the education of their sons, so as to fit them for the common occupations of life, with the least expense to themselves. He adds, that he knows and believes, from conversations which he has had with inhabitants of the town, that some of them do desire a more general education than is now afforded in the school; but he has not the means of

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ascertaining what portion of the inhabitants do entertain such a desire. It is clear to me, therefore, from the evidence of this most able and sensible person, and from the conduct of the trustees themselves, who have shewn, by their amended scheme, a desire to do that which is beneficial to the school, that the system of instruction ought to be extended. And therefore the decree must direct the *Master* to consider and state whether the system of education ought to be extended to other subjects than Latin and Greek.

With respect to the matters of husbandry, there is very little difficulty about the arrangement as to them: that subject may be submitted to the *Master's* consideration in a general form.

The only point which remains to be disposed of, is that which relates to the trustees. It is expressly alleged, on the face of this information, that much inconvenience has arisen from the fact that most of the trustees live at distances, more or less considerable, from *Tiverton*. But that allegation is denied, expressly, by the answer of the master and usher. I do not observe that it is expressly denied by the answer of the trustees; but it is submitted to the Court as a question. I was so much struck with that allegation, that, although I had read all the depositions before, I read every word of them a second time, in order to see whether there was any evidence to support it; but I could not find one word of evidence upon the subject. It is observable that, by the decree which was made in the cause of the *Attorney-General v. Blundell* (in which the information was filed in the year 1734), a rule is laid down with respect to the trustees, namely, that a majority of the trustees ought to be present at the meet-

ings for electing the master, usher, and scholars, and that such elections ought to be made by the majority of the trustees then present. That rule seems to have acted very well, as far as any evidence goes; and, though it may be perfectly true, *primâ facie*, that the circumstance that a gentleman is residing in *Guernsey* or in *France*, may militate with the requirement that he should attend the meetings of the trustees, it must be borne in mind that the increased rapidity in travelling, renders it less necessary, now, that persons should live nearer to *Tiverton* than many of the trustees do. I do not find that the testator himself has required any such qualification; because he has directed that, when the vacancies are to be supplied, they shall be supplied by the heirs of the feoffees, if they be not unfit, and, for such as shall be unfit, then with others near inhabiting, of honest report and reputation. Therefore the testator, himself, has directed that the vacancies shall be supplied either by the heirs of the deceased feoffees or by others near inhabiting; and, as the heirs of the trustees might happen to reside anywhere, it is plain that he has not made it an absolute requisite that the persons who should be chosen new trustees, should be near inhabitants in any sense. Besides, the term, "near inhabiting," is, of itself, a very vague expression, and in order to determine its meaning with a view to any practical purpose, regard ought to be had, not merely to the number of miles which a trustee may live from the place at which the meetings are held, but also to the facility of access which he may have to that place from his place of residence. For these reasons, I do not think it right, in the decree which I intend to make, to give any direction in respect of the residence of the trustees to be hereafter appointed.

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As I have now disposed of all the questions in the cause, I shall proceed to dispose of the costs of it, and also of the costs which were reserved by the *Lord Chancellor*; I mean the costs of the petitions presented by some of the inhabitants of *Tiverton*, and by the *Attorney-General* and the Relators.

I recollect that, on the 14th of February 1840, I made an order, on the petition presented by the inhabitants of *Tiverton*, by which I gave them leave to attend the *Master* and to carry in a scheme under the order which I had made, on the petition of the feoffees, on the 4th of June 1839, and that I reserved the costs of such attendance until after the *Master* should have made his report, and that I dismissed the rest of their petition with costs.

As far as I can recollect, my reason for doing so, was that there was introduced, by the affidavits in support of that petition, a great deal of discussion on the question (which has certainly rankled in the minds of the *Tiverton* people), how far there had been unfairness in the administration of the school as between the natives and the boarders.

On the 26th of May 1840, a petition of appeal from my order of the 14th of February in that year, was presented to Lord *Cottenham*; and on the 18th of January 1841, his Lordship discharged my order, but reserved the costs of it until the hearing of the information; in order, as I collect from the language of his Lordship's judgment, that it might be seen whether relief would be given on the information or not. But whether that were his Lordship's reason or not, it appears to me to be a

very unusual thing, and to tend only to create further dispute, to burthen those gentlemen with the costs, which, in the year 1840, for the reason I have given, I thought it right to throw on them; and therefore I shall order their costs, as well as the costs up to the hearing of the information in this cause, and also the costs of the petition presented by the *Attorney-General* and the Relators, to be paid by the feoffees out of any monies in their hands belonging to the charity*.

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The following minutes of the decree were prepared by the *Vice-Chancellor* himself:—

Refer it to Master *Senior* to whom the reference was made under the order of the 4th of June 1839, to inquire and state of what the charity-property consists, and what is the clear income and annual value thereof, and what is the clear surplus income thereof after providing for the necessary expenses, and the exhibitions and scholarships in the pleadings mentioned, as they at present exist, and order that the *Master* do take all necessary accounts for that purpose: and declare that such clear surplus ought to be applied for the upholding and benefit of the school and matters of husbandry mentioned in the will of the testator *Peter Blundell*: And declare that neither the master nor the usher of the said school, ought to receive any payments from or in respect of any of the boys educated in the said school, or ought to take any boarder, and that none but boys educated as free scholars, *videlicet*, scholars

* The above cause was heard by the *Vice-Chancellor* under an order specially made by Lord *Lyndhurst*, in April 1846. See *post*, pp. 255 and 256.

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educated free of expense in the said school, according to the direction in the said will as varied by this decree ought to be eligible to the said scholarships and exhibitions: And declare that, by children called foreigner or children of foreigners in the testator's will, are mean any children who have not been born in the town or parish of *Tiverton*, or who have not, for the most part before their age of six years, been brought up in the town or parish: And, having regard to the aforesaid declarations, refer it to the *Master* to settle what salaries ought to be paid to the master and usher respectively, and to settle a proper scheme for the application of the income of the said school for the benefit of the said school and the said matters of husbandry: and, in settling the said scheme, the *Master* is to consider whether, having regard to the will of the said testator and the present condition of the said town and parish of *Tiverton* and the increased income of the said school, it would be proper to add to the number of ushers and assistants in the said school, and whether it would be proper that any and what part of the surplus income after providing for the education in grammar as by the said will directed, should be applied in providing instruction in any and what matters of science and literature including some one or more and which of the modern languages; and he is to include such matters in the scheme to be settled by him, as he may think proper. And, inasmuch as no such subsidy-books as are in the said will mentioned, are now used, let the *Master* fix and declare what shall be the new proper qualification for the ten householders in the said will mentioned, in lieu of the qualification therein prescribed: And this Court doth declare that, in future, no foreigner shall be received and admitted from time to time into the said school except with the assent and allowance of ten house-

holders having such new proper qualification: And let the costs of the Relators and Defendants in this cause up to the hearing, and the costs of the Petitioners and Respondents in the several petitions in the pleadings mentioned, and also their costs, charges and expenses properly incurred, not being costs in the cause, be taxed as between solicitor and client, and paid by the Defendants, the trustees, out of any monies in their hands belonging to the charity. Order the parties to produce all the books, &c. in their custody or power, and to be examined on interrogatories, and the *Master* to make them all just allowances. Reserve further directions and subsequent costs and liberty to apply.

Reg. Lib. A., 1845, fol. 2225.

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The following account of the petitions and the proceedings under them, which are mentioned in the foregoing report, is given in order to elucidate what is therein said respecting them, and to shew why a special order for the *Vice-Chancellor* to hear the cause, was considered necessary; and, also, as introductory to a valuable judgment with which Lord *Cottenham* prefaced his order of the 18th of January 1841.

In 1839 a petition was presented, under 52 Geo. 3, c. 101, by the Earl of *Devon* and other feoffees of the charity estates, on the hearing of which, on the 4th of June 1839, the *Vice-Chancellor* directed the *Master* of the Court in rotation to approve of a scheme for the application of the surplus income of the charity property, and for regulating the admission of the children of foreigners into the school, and for the selection of boys

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to serve in husbandry. (See *ante*, pages 202, 203, and 204.) Afterwards, another petition was presented, under the same act of Parliament, by *W. Kettle, Francis Hole, William Hole, John Heathcoat*, and other inhabitants of *Tiverton*, on the hearing of which, on the 14th of February 1840, his *Honor* gave liberty to the petitioners to attend the *Master*, and to carry in a scheme under the order of the 4th of June, 1839; but dismissed the rest of the petition with costs. (See *ante*, pages 204, 205, and 206.)

On the 31st of March 1840, the information was filed.

On the 14th of May 1840, the *Attorney-General* and the said *John Heathcoat* and *William Hole*, the Relators in the information, presented a petition to Lord *Cottenham* (which was intituled in the suit, in the Act of 52 Geo. 3, and in the matter of *Blundell's* school), praying that the *Vice-Chancellor's* order of the 4th of June 1839, might be discharged or varied in such manner as might be proper; and that, in any event, all further proceedings thereunder might be stayed; and that, if the same should be permitted to proceed, such directions might be given as might provide for the several objects that ought to be provided for, and whereby complete justice might be done; and, if necessary, that it might be referred to one of the *Masters* of the Court, or otherwise determined, whether such order or the information ought to proceed, and that all proper directions might be given accordingly.

On the 26th of May 1840, *W. Kettle, Francis Hole*, and all their co-petitioners except *John Heathcoat* and

William Hole, the Relators, presented, to Lord *Cottenham*, a petition of appeal from the *Vice-Chancellor's* order of the 14th of February 1840.

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On the 18th of January 1841, his Lordship made an order on the two last-mentioned petitions, which is here given at length, as a good deal of discussion, as to its meaning, took place before the *Vice-Chancellor* on the 22nd of April 1846, when the question was whether his *Honor* could hear the cause without being specially directed so by the then *Lord Chancellor*, Lord *Lyndhurst*. That order was intituled in the cause and in the matter of the school and of the act of 52 Geo. 3; and, after reciting the petitions that had been presented to Lord *Cottenham* by the *Attorney-General* and the Relators, and by *William Kettle*, *Francis Hole* and others, it proceeded thus:—"His Lordship doth order that the said order of the 14th day of February 1840, made upon the hearing of the petition of *William Kettle*, *Francis Hole* and others, be discharged; and it is ordered that the consideration of the costs of the said order, be reserved until the hearing of the above-mentioned cause; and it is ordered that the said petition as to the question of costs only, do come on to be heard together with the said cause; and it is ordered that all proceedings under the said order of the 4th day of June 1839, made upon the petition of the Earl of *Devon* and others, be stayed until the hearing of the said cause; and it is ordered that the sum of 10*l.* deposited with the registrar by the petitioners, *William Kettle*, *Francis Hole*, &c. &c., on setting down their said petition of appeal, be returned to the said petitioners."

The counsel for the Relators contended that, by this order, Lord *Cottenham* had reserved not only the costs

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disposed of the petition itself, and that, the
Honor could not hear the cause.

The counsel for the defendants contended that *Cottenham's* order had reserved merely the *Vice-Chancellor's* order of the 14th of February and that his Lordship's meaning was that the order on which that order was made should come to be heard, as to the costs of it, together with the costs of the cause, either before the *Vice-Chancellor* or any other Judge of the Court who might hear the cause; and consequently, that the cause might be heard by the *Honor*.

The *Vice-Chancellor* said that, as there was no objection as to the propriety of his hearing the cause, the way would be to apply to the *Lord Chancellor* for an order directing him to hear it.

The application was accordingly made; and on the 25th of April, Lord *Lyndhurst* made the order.

The judgment with which Lord *Cottenham* gave his order of the 18th of January 1841, was

ings which have occasioned difficulties and expense, from which it will be impossible altogether to relieve it.

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The charity property is, by the will of the founder, to be applied in support of a free-school at *Tiverton* and in founding exhibitions for boys educated at that school for the Universities; and other funds have since been given, by other persons, for similar purposes. The inhabitants of *Tiverton* were to be the first objects of the charity; but, in the event of there not being 150 scholars from the town, foreigners were to be admitted, but under a guard evidently intended to protect the interests of the inhabitants. Salaries of a fixed amount were provided for the master and usher, who were prohibited from taking any more from either parent or children, the testator declaring it to be his intention that the school should be a free-school; and he directed that six scholarships should be established in the Universities, to be filled by scholars out of the school. In 1785, upon an information, a decree was made, declaring that the scholars ought to be elected by a majority of the feoffees present at a meeting composed of a majority of the whole number; and it was referred to the *Master* to approve of a scheme for the application of a surplus income. The *Master*, by his report, stated that there was not, at that time, any available surplus; but that, when any should arise, it ought to be employed in increasing the allowances to the scholars at the Universities or in establishing new scholarships, as the trustees should, under the circumstances, think best to answer the charitable purpose of the founder. By an order on further directions of the 1st of August 1740, this scheme was approved, but subject to the further order of the Court; and the parties were to be at liberty to apply to the Court, from time to time, for further direc-

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tions, as occasion should require. The funds having increased, new scholarships were established, but no application appears to have been made, to the Court, under the reservation in the order of the 1st of August 1740. Questions afterwards arose as to the application of the charity funds and the management of the school; which the principal were, first, the appointment of feoffees; it being asserted that the directions of the founder had not, in that respect, been attended to; secondly, the election of foreigners, boys not inhabitants of *Tiverton*, into the school; it being asserted that the guards provided by the founder for the protection of the town had been neglected; thirdly, the extension of the system of education to other useful subjects besides the teaching of the learned languages; fourthly, the permission which had been given to the master and usher to take boarders into their houses; and, fifthly and principally, that those boarders had been permitted to partake largely of the property of the charity, by being appointed to scholarships at the Universities. The income having continued to increase, it exceeded the expenditure; and there was, therefore, a question as to the proper application of the surplus.

Some of these questions are of great importance, particularly the last, and, in a late case of the *Attorney-General v. Lord Stamford*, I had occasion very much to consider it; and my opinion upon it was very fully explained in my judgment. That question is not before me for decision in the present stage of this case. I only allude to it, therefore, and to the opinion I expressed in the *Attorney-General v. Lord Stamford*, to shew that it is a matter for deliberate consideration; and that it is not to be assumed, as free from all doubt, that the mode in which the charity funds have, in this

instance, been applied, will be sanctioned by the Court. Whilst these questions remain undecided as to the principles upon which the charity is to be administered, it is to me obvious that it is impossible to settle any scheme for the application of the surplus income. In executing the usual order for that purpose, the *Master* must either assume that the practice hitherto followed, is the proper course, and therefore found upon it his scheme for the application of the surplus, in which case the foundation may, very possibly, fail, and the whole expense be thrown away, or he must take upon himself to consider and, possibly, depart from the practice hitherto followed, which would be beyond his jurisdiction.

Notwithstanding these very apparent difficulties, a petition was presented, by some of the feoffees, under the 52 Geo. 3, c. 101, *ex parte*, simply praying for a reference to the *Master* to approve of a scheme for the application of the surplus income, and also a scheme for regulating the admission of the children of foreigners; and, on the 4th of June 1839, an order was made according to the prayer of the petition. It appears that, at the hearing of this petition, Counsel appeared, for some of the inhabitants of the town, to oppose the reference prayed; but that the *Vice-Chancellor* declined hearing them, and made the order. I apprehend that, in strictness, such Counsel were not entitled to be heard; but, as making orders under this act is clearly discretionary in the Court, and ought not to be done in cases in which the Court sees that the jurisdiction given by the act cannot be exercised with justice to any parties or with benefit to the charity, such Counsel might, perhaps, have been heard with advantage, for the pur-

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pose of enabling the Court to judge in what manner that discretion ought to be exercised.

The order was made, and, thereupon, another petition was presented, under the act of 52 Geo. 3, praying declarations upon these several points, and a reference to the *Master* to whom the former reference had been made, to settle a scheme for the application of the surplus in conformity with such declarations. If this had been a proper case for the exercise of the jurisdiction of the Court under the 52 Geo. 3, c. 101, the petition would have been a very proper mode of obtaining the judgment of the Court upon several points on which its direction was required; and, if the Court decided any of those points in favour of the petitioners, the order made would have been a very necessary instruction to the *Master* to whom the first order had delegated the duty of settling a scheme for the application of the surplus.

Upon the hearing of this petition, two objections were made, which appeared, to the *Vice-Chancellor*, to be fatal, namely, that it had not received the sanction of the *Attorney-General*; and that the objects prayed for, could only be obtained, and the question only entertained upon an information. He, therefore, directed that the petitioners should pay the costs; but gave them leave to attend the *Master* under the former order, and to carry in a scheme under that order.

As a general proposition, I think that the two objections were well founded; but the order actually made giving the petitioners leave to lay a scheme before the *Master* upon the former order, if not inconsistent with

the allowance of these objections, appears to me to have been, at least, useless; for, as I have already observed, nothing could be done under that order before a decision of the questions which were pending; and it could hardly have been supposed that the petitioners would become parties to a report from which all these questions would necessarily be excluded, and which must have assumed the propriety, and, to a degree, insured the continuance, of that course of administration which they sought to have altered. I have said that, as a general proposition, I thought the two objections made were well founded: that opinion rests upon the decisions in *Ex parte Rees* (e), *The Attorney-General v. Green* (f), *Dean Clarke's Charity* (g), and *Phillipott's Charity* (h), and what was said, by Lord Redesdale and Lord Eldon, in *The Corporation of Ludlow v. Greenhouse* (i); which cases also prove that it is in the discretion of the Court, if it thinks the case requires it, to decline to make an order upon petitions under the act, and to require the parties to proceed by information; and they appear to me also to shew that, under the circumstances and during the pendency of the questions respecting the administration of the charity, the order of the 4th of June 1839, ought not to have been made; but, as it was made, and the whole subject before the *Master* left to the exclusive conduct and management of the feoffees or trustees, whose mode of administering the funds was challenged and whose right to be such trustees was one of the matters in dispute, it is quite a different consideration whether the course adopted for the purpose of raising the questions in difference, had not

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(e) 3 V. & B. 10.

(h) Ibid, 381.

(f) 1 Jac. & Walk. 303.

(i) 1 Bligh, N. S., 17.

(g) *Ante*, Vol. VIII., p. 34.

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so much of sanction from the former order as to make it reasonable that the question of costs of that petition should, at all events, have been reserved. If, as the *Vice-Chancellor* thought and as I think, it was not competent for the Court, upon a petition under the statute to exercise any jurisdiction upon the extensive and fundamental questions raised as to the principle upon which the charity was to be administered, it appears to me that it could not be right for the feoffees to obtain an order *ex parte*; the effect of which must be either to exclude all those questions and the intervention of all persons differing from them in opinion, or to expose those parties to the necessity of adopting other and expensive proceedings for the purpose of raising them and which, if adopted, would render their own proceedings nugatory. The order made, notwithstanding the objections of those persons, though irregularly brought forward, may, I think, well be supposed to have been considered, by such persons, as indicating the opinion of the Court, that the subject was one proper for its administration and decision upon petitions under the act; and, if that had been so, it would have been difficult to support the objection that the *Attorney-General* sanction had not been previously obtained to the petition; because, as the *Vice-Chancellor* very truly observed, the Court had been in the habit of receiving petitions under the act, though not signed by the *Attorney-General*, upon matters which grow out of or have reference to what the Court has before done upon a petition properly signed by him; and, if the Court were to exercise the large jurisdiction under the act, of making *ex parte* orders in cases in which questions exist which cannot be disposed of without an information, the greatest injustice might be done, if the parties interested in such questions and likely to be affected by such a

parte orders, were not at liberty to apply to the Court without the previous permission of the *Attorney-General*. In *ex parte Rees*, and in other cases, Lord Eldon has expressed himself strongly upon the danger which might arise in exercising the jurisdiction under the act without due caution in this respect; besides which, if there had not been any other objection to the petition, the Court might probably have ordered it to stand over, that it might be seen whether that could not be rectified. I think, therefore, the petitioners ought not to have been made to pay the costs of the petition, upon the mere ground of their error in the mode of proceeding; and, thinking, as I do, that another course must be taken for the purpose of obtaining a decision upon the points in difference, before any scheme can be approved of for the application of the surplus, I think that the costs of the petition, without any reference to its merits and the case intended to be raised by it, ought to be reserved till such decision may be had; my opinion being that, if the petitioners succeed in the case they make, they ought not to be made to pay the costs occasioned by the error into which they have, I think, naturally been led.

There is now an information filed, raising all these questions, in which, if the parties continue to differ about them, they must be decided; and, till that time arrives, I think that all proceedings before the *Master* upon the order of the 4th of June 1839, must be stayed. I say stayed, because, if no alteration shall be made in the existing practice in administering the charity fund, that order may, after that has been decided, become available. I also think that the order of the 14th of February 1840, must be discharged; and, although the information has superseded the petition upon which

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that order was made, I think that the costs should be reserved until the fate of the information can be ascertained ; and, for that purpose only, the petition should now be ordered to come on with the information. I in the *Attorney-General v. Green*, Lord *Eldon* referred it to the *Attorney-General*, to consider and report whether the information or petition should proceed. I cannot think that necessary in this case, the *Attorney-General* being a petitioner before me, praying that all proceedings under the order of the 4th of June 1839, may be stayed.

I think it right, in all cases, to abstain, as much as possible, from expressing my opinion upon matters not directly before me for judgment ; but, in the case of charity, in which continued litigation, whatever be its result, must greatly exhaust the funds otherwise applicable to objects the most desirable, I cannot but express a wish that both parties would consider whether the result which both have in view, may not be obtained without much further expense. It happens that, in the case of the *Attorney-General v. Lord Stamford*, nearly all the questions in this case, came before me, and I did not pronounce my judgment without the most careful consideration of all the principles and authorities which appeared to me applicable to it. The parties in the case, may have reason for wishing to have a judgment in their own case ; and, if so, they are certainly entitled to it ; but, before they determine upon proceeding adversely in the present litigation, they will, I have no doubt, inform themselves of the particulars of the case to which I have referred, and form their determination as to their future proceedings, upon a due sense of what the interests of the charity may require.

TRULOCK v. ROBEY.

THIS was a suit to redeem a mortgage of copyhold tenements, which the original mortgagee had transferred in October 1774, to *John Robey*, since deceased, the late father of the Defendant.

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11th and 24th
June, and
31st July.

*Bill of Review.
Pleading.*

The bill alleged that, shortly after the transfer was made, the Defendant's father was admitted to the tenements, and thereupon entered into *the possession thereof and into the receipt of the rents and profits thereof*; and that he continued in *such possession* until his death: that he made his will, dated the 16th of April 1812, and thereby devised all his copyhold tenements and hereditaments to the Defendant, his heirs and assigns: that he died previously to the 17th of October 1817, and, on his death, the defendant entered *into possession of the mortgaged tenements*, and had ever since been *in possession thereof and in receipt of the rents and profits thereof*: that the *said rents and profits* had been of great value, and, *by means thereof*, the whole or almost the whole of

After decree in a suit against the heir of A., the Plaintiff petitioned for leave to file a bill of review, alleging error apparent on the face of the decree, and also that the Plaintiff had discovered, since the decree, that the Defendant was the executor of A., and that it was essential to the establishment of the Plaintiff's

rights, to bring the Defendant before the Court, in his executorial character.

Petition dismissed, because a bill of review for error apparent, may be filed without the leave of the Court; and because the Defendant had admitted, in his answer, that A.'s will was in his possession.

Occupation-rent.—Mortgagor and Mortgages.—Redemption.—Pleading.

In a suit to redeem, against a mortgagee in possession, the Court will not direct the *Muster* to fix and charge the Defendant with an occupation-rent, unless the Plaintiff alleges and shews, not only that the Defendant has been in possession of the mortgaged estate and in receipt of the rents and profits of it, but also that he has been in the actual occupation of it or of part of it—*Semble*.

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what was due on the mortgage, had been satisfied and discharged, and that the Plaintiff was entitled to have an account taken of *the rents and profits received by the Defendant*, and to have her moiety* of the tenements surrendered, by the Defendant, to her, her heirs and assigns. The bill prayed for an account of *the rents and profits of the mortgaged tenements which had been received by the Defendant*, or any other person by his order or for his use, or which, without his wilful neglect or default, might have been received; and also of the mortgage-money and the interest thereon; and, in case it should appear, on taking those accounts, that the amount of the *said* rents and profits exceeded the amount of the mortgage-money and interest, that the Defendant might be decreed to pay one moiety of the excess, to the Plaintiff, and to surrender, to her, one moiety of the mortgaged tenements; or, in case it should appear that the said rents and profits were less, in amount, than the mortgage-money and interest, then that, on the Plaintiff paying the defendant a moiety of the deficiency, the Defendant might be decreed to surrender her moiety of the tenements to her, her heirs and assigns.

The answer stated, *amongst other things*, that *Robey* the father entered into possession of the mortgaged tenements and into the receipt of the rents and profits thereof in March 1781, and continued in such possession and in receipt of the said rents and profits until the time of his death in the bill mentioned, and that he never accounted for such rents and profits; and that, on the 31st of October 1817, the Defendant was admitted to

* A report of the hearing of the cause is given *ante*, Vol. XII., p. 402. *John Robey*, the father, purchased one moiety of the equity of redemption, before he made his will.

the tenements, and that, upon his father's death, he permitted his mother *to continue in the occupation* of them until her death, which occurred on the 31st of May 1822, and that, upon her death, the Defendant entered *into possession* of the tenements, and that he had ever since been *in the possession of the same and in the receipt of the rents and profits thereof*.*

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The cause was heard, on bill and answer, by the *Vice-Chancellor of England*, on the 19th of November 1841, when His *Honor* directed the *Master* to take an account of what was due, to the Defendant, on the mortgage in the pleadings mentioned, and to tax the Defendant his costs of the suit; and also to take an account of the rents and profits of the mortgaged tenements *received by the Defendant* or by any other person or persons by his order or for his use, or which, without his wilful default or neglect, might have been received; and His *Honor* ordered that what should be coming on the said account of rents and profits, should be applied, in the first place, in payment of the interest, and then in sinking the principal due in respect of the mortgage; and that, upon the Plaintiff paying the Defendant what the *Master* should certify to be the balance remaining due to him (if any) on taking the said accounts, with the costs to be taxed as aforesaid, within six months after the *Master* should have made his report, the Defendant should surrender to the Plaintiff the moiety of the tenements to which she was entitled; and, in default thereof, that her bill should be dismissed with costs.

* In a part of the answer which was not set forth in the petition, the Defendant said that his father had been in the *undisturbed possession* of the tenements, for upwards of twenty years before his death.

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On or about the 6th of June 1844, the Defendant enrolled the decree.

On the 30th of May 1844, the *Master* made his report, and thereby certified, amongst other things, that, in March 1781, *John Robey*, the elder, entered into possession of the mortgaged tenements and into the receipt of the rents and profits thereof, and continued in such possession and in receipt of the said rents and profits, until his death, which happened on the 25th of February 1817, when the Defendant was admitted to the tenements, and that he permitted his mother to continue in the occupation of them down to the time of her death, which took place on the 31st of May 1822, and that, upon her death, the Defendant entered into possession of the tenements and into the receipt of the rents and profits thereof, and had ever since been in possession of the same and in receipt of the rents and profits thereof: that the whole of the mortgaged tenements had been and were worth to let at a yearly rent of 12*l.*, and that the part of them in the occupation of the Defendant, was worth to let at the yearly rent of 7*l.*: and the *Master submitted*, to the judgment of the Court, that the Defendant should be charged with 136*l.* 10*s.*, as an occupation rent, for such part of the premises as had been in his occupation, being after the rate of 7*l.* per annum from Michaelmas 1824 to Lady-day then last; and the *Master certified* that he had not taken any account of the rents and profits of the tenements received by *John Robey, the elder*, by reason of the decree not containing any direction that he should do so; and he found that 50*l.* 5*s.* 11*d.* had come to the hands of the Defendant, in respect of the rents and profits of the tenements; that 99*l.* 12*s.* 8*d.* was due for principal, and that (after deducting the 50*l.* 5*s.* 11*d.*)

326*l.* 9*s.* 4*d.* was due for interest on the mortgage, and that those two sums amounted to 426*l.* 2*s.*; but, as *Robey* the father had, in his lifetime, purchased a moiety of the tenements, only a moiety of the 426*l.* 2*s.* was due to the Defendant.

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The Plaintiff excepted to the report on the ground that, as the decree had directed an account to be taken of what was due on the mortgage, the *Master* ought to have taken an account of the rents and profits received by *Robey* the father, as well as an account of those received by the Defendant. In November 1844, the exceptions were argued before the *Vice-Chancellor*, and were overruled by him.

Shortly afterwards, the Plaintiff having made default in payment of the amount reported due from her, the Defendant obtained an order dismissing her bill.

She then appealed to the *Lord Chancellor*, from that order and also from the order overruling her exceptions. The appeals were heard on the 7th of May 1846, when the *Lord Chancellor* held that the direction to take an account of what was due on the mortgage, did not authorise the *Master* to take an account of the rents and profits received by *Robey* the father, particularly as there was an express direction to take an account of the rents and profits received by the Defendant; and his Lordship dismissed the appeal.

Shortly afterwards, the Plaintiff presented a petition, which, after stating, the bill, answer, decree and report, as they are hereinbefore set forth, alleged that, according to the evidence adduced before the *Master* and by his report, it appeared and the fact was that, if *Robey*

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the father, *or his estate*, had been charged, (as the Plaintiff submitted ought to have been the case), *with a fair occupation rent for the mortgaged premises during the time he was in possession thereof as aforesaid*, the amount of such rent would have been sufficient to satisfy the whole of the principal and interest due on the mortgage, and to leave a balance of 79*l.* 16*s.* 7*d.* due, to the plaintiff, *from Robey the father*, at his death: that the sum payable, by the Defendant, in respect of the rents and profits received and *the occupation rent* payable, by him, for the mortgaged premises, from the death of *Robey the father* up to the date of the *Master's* report, was 327 *l.*, one moiety of which belonged to the Plaintiff: that the amount due to the Plaintiff for interest on the rents and profits received and to be accounted for by the Defendant, in respect of the Plaintiff's moiety of the mortgaged premises, was 113*l.* 8*s.*, making, with one moiety of the 327*l.*, the sum of 282*l.* 8*s.* due to her from the Defendant: that, *at the time the decree was made, the will of Robey the father had not been proved, and the Plaintiff did not know and had no means of ascertaining who was the executor thereby appointed, and was therefore, unable to make such executor a party to her bill*: that the will was not proved until the 22nd of January 1845, when the same was proved by the Defendant as the sole executor thereof, and who, as the Plaintiff verily believed, *purposely abstained from proving it, in order to prevent her from introducing such statements into her bill, as were necessary to entitle her to have an account, against the estate of Robey the father, of the rents and profits of the mortgaged premises received and to be accounted for by him, and to charge such estate with any balance that might be found due to her in respect thereof*: that she filed exceptions to the *Master's* report, on the ground, principally, that the *Master*

ought to have certified that there was not any sum then due, on the mortgage, in respect of principal or interest: that the exceptions were argued before and were overruled by the *Vice-Chancellor* on the 19th of November 1844: that, on the 2nd of December 1844, the Defendant obtained an order for the dismissal of the Plaintiff's bill: that she appealed against that order and also against the order overruling her exceptions; but her appeals were dismissed: that she was advised that the decree and the orders made subsequently thereto, were erroneous and ought to be reversed; and that it was essential to the establishment of her rights, that she should have leave to bring before the Court the facts discovered by her as aforesaid, of the Defendant having been appointed executor of his father's will, and of his having proved it.

The petition prayed that the Plaintiff might be at liberty to file a bill of review for the purpose of obtaining a reversal of the decree and of such of the before-mentioned orders, as might prevent her from establishing her rights and obtaining a just decree in relation to the mortgage.

Mr. *Koe* and Mr. *Miller*, in support of the petition.—A bill of review may be filed if there is error apparent on the face of the decree, or if the Plaintiff has discovered new matter since the decree was made. Both those grounds exist in the present case.—First, there is error apparent on the face of the decree; for it directed, in effect, an account to be taken of the mortgage-money and of the interest which became due on it to *Robey* the father; but it did not direct any account of the rents received by him: and the *Master* has taken an account of the whole of the interest from the time when the mortgage was transferred to *Robey* the father, but has not taken any account of the rents received by him; and

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has charged the Plaintiff with interest from the date of the transfer, but has not credited her with the rent received by *Robey* the father. The result is that the balance, instead of being in her favour, is against her. If a mortgage is assigned, either voluntarily or for value and the mortgagor is not a party to the assignment, the assignee can claim nothing more than what is actually due between the mortgagor and mortgagee: and it is not necessary to make the mortgagor, if he be living or his personal representative, if he be dead, a party to a suit to redeem the mortgage*. [*The Vice Chancellor*.—No one can dispute that the Plaintiff was entitled to an account of the rents received by *Robey* the father, under whom the Defendant claims. But the Plaintiff stated, in her bill, that *Robey* the father, had been in possession and in receipt of the rents of the mortgaged tenements, and yet she asked only for an account of the rents received by the Defendant. How can a Plaintiff say that a decree which gave him all that he asked, is erroneous? When a Plaintiff expressly stints his relief, is he at liberty to say, afterwards, that there is error in the decree? Does not the maxim: "*expressio unius est exclusio alterius*," apply in such a case?] It might have been more correct, but it was not necessary for the Plaintiff to ask, specifically, for an account of the rents received by *Robey* the father, for he might have obtained it under the prayer for general relief.

The decree is also erroneous, because it does not direct the *Master* to inquire and state whether the Defendant and his father, or either of them, had been in the actual occupation of the mortgaged tenements or

* See 9 Ves. 269.

any part thereof; and, if he should find in the affirmative, to set an occupation rent on the whole or part of the tenements, as the case might be, and to include it in the account of rents and profits: *Smart v. Hunt* (a). In that case the decree contained such a direction, although the bill merely alleged, as the bill in this Cause does, that the Defendants and the testator under whom they claimed, had been in the possession of the mortgaged premises, and in receipt of the rents and profits thereof. [*The Vice-Chancellor*.—A man may have been in possession of an estate, without having been in the occupation of an acre of it. Any one is in possession of an estate, who receives rent from the tenants who do occupy it. Why did not the Plaintiff amend her bill by stating that the Defendant had been in the occupation of part of the tenements? How can the Court make a decree on a fact that does not appear on the bill? On referring to Reg. Lib., I see that, in *Smart v. Hunt*, the bill asserted that the Defendants set up an absolute claim to the mortgaged estate: and the Defendants, by their answer, claimed to hold it according to the will of the testator, on the ground of there having been possession for thirty-five years without any claim; so that they claimed, in effect, to be owners of the estate. It seems to me to be a matter of course, in such a case, to direct the *Master* to set an occupation-rent.]

Secondly, evidence has been discovered, since the decree, that the Defendant represents his father*.

(a) 1 Vern. 418, cited in *Knowles v. Chapman*, Seton on Decrees, 149. See 686. The petitioner's counsel referred also to the decree

* The Defendant did not prove his father's will until after the decree: and matter arisen after decree is not a ground for filing a bill of review.

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The Vice-Chancellor.—If you propose to proceed against the Defendant as executor to his father, you propose to make, by your bill of review, a case entirely different from that made by your original bill. That bill treats the Defendant as beneficial owner of the mortgage; but you propose to treat him as seised of the legal estate in the tenements, in trust for the personal estate of his father to whom the mortgage-money belonged.

Mr. *Wakefield* and Mr. *Randell*, for the Defendant.

First, there is no error apparent on the face of the decree. The only way in which the counsel for the petitioner have attempted to show that the decree is erroneous, is by referring to the bill and answer; but, where a decree is sought to be reviewed on the ground of its being erroneous, the pleadings cannot be referred to: the error must appear upon the decree itself*. [*The Vice-Chancellor.*—Before the new orders of December 1833, the Court could not look at the decree without seeing the bill and answer.] If a party who seeks to file a bill of review, may refer to the pleadings, he may

* See *Perry v. Phelps*, 17 Ves. 173, where Lord *Eldon* says: "There is a great distinction between error in the decree, and error apparent. The latter description does not apply to a merely erroneous judgment; and this is a point of essential importance; as, if I am to hear this cause upon the ground that the judgment is wrong, though there is no error apparent, the consequence is that, in every instance, a bill of review may be filed, and the question whether the cause is well decided, will be argued in that shape; not whether the decree is wrong or right on the face of it. The cases of error apparent found in the books, are of this sort: an infant not having a day to shew cause, &c. not merely an erroneous judgment."

refer also to the documents and evidence in the cause ; for they are referred to in the preamble to the ordering part ; and, in that case, there would be no distinction between an appeal and a bill of review.

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The second ground on which the Plaintiff relies, is the discovery of new matter since the decree was made : and she states, in her petition and in her affidavit in support of it, that, when the decree was made, the will of *Robey*, the father, had not been proved, and that she did not know and *had no means of ascertaining* who was the executor appointed by it ; and that she had been informed that it was not proved until the 22nd of January 1845, when it was proved by the Defendant as the sole executor thereof ; and that she had been advised that it was essential *to the establishment of her rights*, that she should have leave to file a bill of review for the purpose of bringing before the Court the facts, discovered by her as aforesaid, *of the Defendant having been appointed executor and of his having proved the will*. These statements are untrue ; for, in the first place, she might have ascertained who was the executor, by interrogating the Defendant on the subject : and she was informed by the answer that the original will was one of the documents in the possession of the Defendant : so that she must have known that he was the executor appointed by the will. In the next place, it is not essential to the establishment of her rights, as asserted by her bill, that the Defendant should be brought before the Court in his character of executor : and it is not the office of a bill of review to enable the Plaintiff to assert a new right ; but its office is to enable him to bring forward facts which existed before but were discovered after the decree in the original suit, and which tend to show that

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he is entitled to what he asked by his original bill. In this case, the decree gives the Plaintiff all the relief that she prayed by her original bill, and all that she was entitled to according to the case made by it; and therefore she cannot be allowed, consistently with the rules of the Court, to file a bill of review.

Mr. *Koe* replied.

The VICE-CHANCELLOR:

31st July.

One of the grounds on which the Plaintiff asks for leave to file a bill of review, is error apparent on the face of the decree. But Lord *Redesdale* lays it down, that, in such a case, the bill may be filed without the leave of the Court (*b*): and therefore, so far as that ground is concerned, the petition is unnecessary.

The other ground is the discovery of new matter since the decree was made: and, in support of that, the Plaintiff states, in her affidavit, that she did not know and had no means of ascertaining who was the executor appointed by the will of *Robey* the father. But that statement is

(*b*) See Treat. on Plead., 3rd edit., p. 66.

It seems, from what was said, by the *Vice-Chancellor*, in the course of the argument in the above case, to be advisable to state, in a bill to redeem against a mortgagee in possession, that the Defendant, and, if he is not the original mortgagee, those under whom he claims, have

been in the actual occupation of the mortgaged estate as owner or owners thereof, in addition to stating that they have been in possession of the estate and in receipt of the rents and profits of it; and to pray that the *Master* may set an occupation rent, and include it in his account of rents and profits received.

falsified by the answer, in which the Defendant admits the original will to be in his possession. Therefore that ground also fails.

Petition dismissed with costs.

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In March, 1847, the Plaintiff filed a bill of review, which, after stating the decree and the prior proceedings in the original suit, in precisely the same terms as they were stated in the petition, proceeded to allege that the decree was enrolled, by the Defendant, on the 6th of June, 1844; that the *Master* having reported that he had not taken any account of the rents and profits of the mortgaged premises received by *Robey* the elder, by reason of the decree not containing any direction that he should do so, and having found that 372*l.* 5*s.* 11*d.* was due to the Defendant for principal, interest, and costs, the *Master* appointed the Plaintiff to pay the same to the Defendant on the 30th of November, 1844; that the Plaintiff took exceptions to the report, on the ground, amongst other things, that the *Master* ought to have certified that there was not any sum then due in respect of principal or interest on the mortgage; that the exceptions came on to be heard, before the *Vice-Chancellor*, on the 19th of November, 1844, who overruled the same, and which decision was afterwards confirmed, on appeal, by the then *Lord Chancellor*; that the 372*l.* 5*s.* 11*d.* not having been paid by the Plaintiff to the Defendant, the Defendant obtained an order by which the bill was dismissed; that the Plaintiff was advised and humbly insisted that the decree was erroneous in not having directed an account to be taken of the rents and profits of the mortgaged premises received by *Robey* the elder, or which, without his wilful neglect or default,

Bill of Review.

In support of a bill of review for error in a decree, the pleadings in the cause cannot be referred to. Nothing can be looked at but the decree itself.

Parties.

Mortgagor.

Mortgagee.

Redemption.

In a suit to redeem against a devisee of the mortgage, an account of the rents received by the devisor may be obtained, without his being represented on the record.

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might have been received by him; and in not having directed an occupation rent to be fixed on the premises during the time that *Robey* the elder was in the possession thereof; and also in not having directed that an occupation rent should be fixed upon the mortgaged premises or such parts thereof as had been in the possession or occupation of the defendant after the death of his father and that the Defendant should be charged therewith, so as that the Plaintiff might have credit, in the account to be taken of what was due on the mortgage, for the rents and profits of the mortgaged premises received by *Robey* the elder, or for a moiety thereof, and also for such sums as the *Master* should fix as a proper occupation rent for the premises during the lifetime of *Robey* the elder and for the occupation thereof by the Defendant, or for a moiety of such occupation rents; and that the decree, being so erroneous in respect of the aforesaid errors or omissions, ought to be opened, and that the order dismissing the original bill ought to be reversed or discharged.

The bill of review prayed that the decree might be reviewed and reversed, or varied and opened, and that such directions might be inserted therein as thereinbefore mentioned; or that some other directions might be inserted therein or added thereto, so as to effect the purposes aforesaid; and that the order of dismissal might be reviewed, and reversed or discharged.

The Defendant demurred to the bill of review, because the Plaintiff had not shewn, by it, any matter of equity to entitle her to the relief sought thereby; and because there was not any error or matter of law appearing in the body of the decree, upon or for which it, or any of the matters or things thereby settled or decreed,

ought to be reversed, set aside, impeached, or altered ; and because it did not appear, by the bill of review, that the Plaintiff had paid the costs of dismissal mentioned or referred to in the decree, or obtained any order of the Court dispensing with the payment of them.

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Mr. *Bethell*, and Mr. *Randell*, in support of the demurrer, said that the bill alleged that certain directions which were not contained in the decree, ought to have been inserted in it ; but that the Court could not decide whether the decree ought or ought not to have contained those directions, without perusing the pleadings in the cause ; and, consequently, that the bill could not be sustained. They added that, if the pleadings could be looked at, the matters alleged as errors would not be found to be so ; for an account of the rents received by *Robey* the elder, could not have been directed in a suit to which his personal representative was not a party ; nor could the *Master* have been directed to fix an occupation rent, in a suit in which it did not appear, from the bill or from the answer, that either the Defendant, or his father under whom he claimed, had been in the occupation of any part of the mortgaged premises : *Perry v. Phelps* (c), *Haig v. Homan* (d).

In support of the second ground of demurrer, the non-payment of costs, they referred to Pract. Reg., edited by *Wyatt*, page 97, and *Felton v. Earl Macclesfield* (e).

Mr. *Koe* and Mr. *Miller*, for the Plaintiff, said that, before the new orders of December 1833 came into

(c) 17 Ves. 173.

(d) 8 Cl. & Fin. 320.

(e) 1 Vern. 264.

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operation, the pleadings were recited in and formed part of the decree in the cause; that, by those orders, the were directed to be referred to in the decree, and therefore, they still continued part of it; indeed that a bill of review could be sustained, unless the pleadings of the original cause were allowed to be looked at: that an account of the rents received by *Robey* the elder, might and ought to have been directed, in the absence of his personal representative, although his estate could not have been charged (and the Plaintiff did not seek to charge it) with the balance, if any was due from him in *Chambers v. Goldwin* (f); that the original bill stated and the answer admitted that both *Robey* the elder and the Defendant had been in possession of the mortgaged premises; that "possession" was synonymous, or, in all events, consistent with, "occupation," and, therefore, the decree ought to have directed the Master to fix an occupation rent and to take an account of it as well as of the rents and profits received by the father and son, and to set off the amount against what the Master should find to be due on the mortgage. [The Vice Chancellor.—The bill states that the decree is erroneous on the face of it. I admit that it does not state so, expressly; but it must be taken so to state; for, otherwise, it could not have been filed, as it has been, without the leave of the Court. It sets forth the bill pretty much at length and then it says that the Defendant put in his answer on a certain day, and thereby stated, *amongst other things* How can I say that the decree is erroneous on the face of it, when those other things, which are not set forth and which are not stated to be irrelevant to the purposes of the bill, might so far have controlled the effect of the things that *are* specifically set forth, as not to make the

decree erroneous on the face of it?] The bill sets forth that part of the answer on which the decree was founded, and which was necessary to shew that the decree is erroneous on the face of it. [The *Vice-Chancellor*.—How am I to be satisfied of that, unless I see the whole of the answer? If you were entitled to have an account of the rents received by *Robey* the elder, why did you not pray for it? why did you expressly limit the account prayed for by your bill, to the rents and profits received by the Defendant?] The bill alleged that *Robey* the elder had been in receipt of the rents, and it prayed for an account of what was due on the mortgage, and also for general relief. But the account of what was due on the mortgage, would of itself have included an account of the rents received by *Robey* the elder. [The *Vice-Chancellor*.—The contrary was decided by the *Lord Chancellor*, when you appealed from my order on the exceptions to the *Master's* report. If you were entitled to have the account under the prayer for general relief, that prayer would have entitled you to ask also that, if *Robey* the elder should be found to have received more than was due to him on the mortgage, the surplus might be repaid to you.] We could not have asked nor did we ask for that, because his personal representative was not a party to the suit.

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Lastly, we submit that the decree is erroneous on the face of it, because it directs the costs of the suit to be paid by the Plaintiff in the first instance; whereas it ought to have directed that, if the mortgage debt was satisfied when the Defendant took possession of the premises, he should pay the costs: *Quarrell v. Beckford* (g), *Wilson v. Metcalfe* (h).

(g) 1 Madd. 269.

(h) 1 Russ. 530.

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THE VICE-CHANCELLOR:

I shall allow the demurrer; because a bill of review filed without the leave of the Court, can be sustained only on the ground of error appearing on the face of the decree.

The outline of the case is this. In 1767 the Plaintiff's ancestor mortgaged certain copyhold tenements *Henry Curtis* in fee. In 1774 *John Robey*, the father of the Defendant, paid off the mortgage, and the mortgagee surrendered the tenements to him in fee; after which he entered into the possession and receipt of the rents of the tenements. In 1804 he purchased the equity of redemption in a moiety of the tenements. In 1817 he died, having devised all his copyhold tenements and hereditaments to the Defendant in fee. The Defendant, upon his father's death, entered into the possession and receipt of the rents of the mortgage tenements.

The Plaintiff derives her title to the unsold moiety of the equity of redemption, by descent from the original mortgagor; and, in 1838, she filed her bill against the Defendant, and, after alleging in it, that the whole or almost the whole of the moiety of the mortgage money and interest due in respect of her moiety of the tenements, had been satisfied and discharged by means of the rents received by the Defendant, she prayed for an account, not of the rents received by *Robey* the elder but only of the rents received by the Defendant; so that she deliberately avoided asking for an account of the rents received by *Robey* the elder. It is true that she did ask for general relief, and that, in point of law, she was entitled to an account of the rents received by *Robey*

the elder; but, as she asked only for an account of the rents received by the Defendant, I am by no means certain that she could have had an account of the rents received by *Robey* the elder under the prayer for general relief, especially as she had alleged, by her bill, that the whole or almost the whole of the mortgage-money and interest had been satisfied by the rents received by the Defendant.

1846.

TRULOCK

v.

ROBEY.

The bill of review states that the Defendant put in his answer to the original bill, and thereby stated, "amongst other things." It appears, therefore, on the face of the bill of review, that the decree was made on bill and answer, and that there were other things in the answer than those which the bill of review sets forth. How then am I to say that those other things (which, it is observable, receive no character or colour from the statements in the bill of review), might not have shewn that something was due to the Defendant? and then, it would have been right not to order the costs to be paid by the Defendant. As, then, it is impossible for me to say, from the statements in this bill, that the decree is wrong upon the face of it, I shall allow the demurrer*.

* The above judgment proceeds upon the assumption that, where a bill of review impeaches a decree for error on the face of it, the pleadings may be referred to for the purpose of deciding the point. But the *Lord Chancellor*, when the case came before him, on appeal, in Michaelmas Term 1847, held, as Lord *Eldon* had done in *Perry v. Phelps*, 17 Ves. 178, that nothing but the decree could be looked at. His Lordship said, in the course of his judgment, that the Plaintiff either did not ask, at the hearing of the original cause, for an account of the rents received by *Robey* the elder, or she did ask for it and was refused: that, if she did not ask for it, she had no right to complain; and, if she did ask for

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v.
ROBBY.

it and was refused, the filing of a bill of review was not the proper course to get the decree set right.

His Lordship, however, affirmed the *Vice-Chancellor's* order.

1846:

29th May.

Partition.

In a suit for partition, if a reference is necessary to ascertain the interests of the parties, the direction for the commission ought to be postponed until the hearing for further directions.

COLE v. SEWELL.

IN this case, the *Vice-Chancellor* said that, in a suit for partition, if a reference is necessary to ascertain the shares and interests of the parties, the direction for issuing the commission ought not to be embodied in the decree on the hearing, but ought to be postponed until the *Master* has made his report and the cause comes on for further directions (a).

Mr. Stuart, Mr. Hislop Clarke, and Mr. Shebbeare were counsel in the cause.

(a) See Seton on Decrees, 187 et seq., and *The Attorney-General v. Hamilton*, and other cases there referred to.

ROBERTSON v. LOCKIE.

articles of partnership between the Plaintiff and Defendant, dated in 1841, either party was to be at liberty to dissolve the partnership on the 31st of December in any subsequent year, by giving six months' notice to the other party. The Defendant having become deranged in his intellects, the Plaintiff, in June, 1845, served him with notice to dissolve the partnership on the 31st of December following; and the bill, which was filed in January 1846, prayed that the partnership be declared to have been dissolved on that day, and that the affairs of it might be wound up.

Bethell and Mr. *Heathfield*, for the Plaintiff, contended that the power to dissolve the partnership was vested in the Defendant, and that he was able on the happening of any event which made him deranged to put an end to the partnership; and, consequently, that the notice was effectual, notwithstanding the Defendant's lunacy.

Anderdon and Mr. *Smythe*, for the Defendant, contended that the case was not provided for by the articles, and that the notice was ineffectual, because it was served on a person who was perfectly incompetent to accept of it. They prayed that the partnership ought to be declared to be dissolved from the date of the decree: *Besch v. Bickel* (a); *Kirby v. Carr* (b); *Joy v. Birch* (c).

1846:
29th May.

Partnership.
Dissolution.
Lunatic.

By articles of partnership between A. and B. the partnership was to be dissolved on either party giving the other six months' notice. A. gave the required notice.

Held that it was effectual, notwithstanding B. was insane when it was given.

¹ Mill. 172.

(b) 3 You. & Coll. Ex. Ca. 184.

(c) 4 Cl. & Fin. 57.

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ROBERTSON
v
LOCKIE.

The VICE-CHANCELLOR:

This, to a certain extent, is a new point; but, as parties had contracted that their partnership should be dissolved on six months' notice being given, my opinion is that, when the notice was given, every thing was done that the parties had agreed should be done.

This case is not analogous to *Besch v. Frolich*; in that case, no notice was given. It does not follow, because the Defendant was insane, that he did not know that the notice was a notice to dissolve the partnership. If he had been perfectly deaf and blind, the notice would have been effectual. But, whether he knew it or not, I am of opinion that, as a notice was given conformable to the terms of the articles, it was perfectly sufficient for the party who served it, was not bound to find out the standing for the party on whom it was served. Therefore, I shall declare that the partnership was dissolved on the 31st December 1845.

LYON v. COWARD.

LYON v. BALL.

1846:

29th May.

Will.

Construction.

Issue

construed

Children.

THOMAS ASHTON, the testator in the cause, after making certain bequests to his wife and giving one-fourth of the sum of 1,600*l.* to his sister *Martha Lyon*, another fourth to his sister *Alice Davies*, another fourth to his sister *Ann Whitfield*, and the remaining fourth to his sister *Phebe Lewis*, for their lives respectively, gave all the residue of his estate, whether real or personal, to his wife and *James Trotter*, *John Bibby*, and *Thomas Trotter*, their heirs, executors, administrators, and assigns: "Upon trust to pay to, or permit and suffer my said wife to receive the rents, dividends, interest, and produce of the said residue of my estate and effects, for her own use and benefit, for and during the term of her natural life, and, on her decease, then upon trust that they, the said *James Trotter*, *John Bibby*, and *Thomas Trotter*, or the survivors or survivor of them, his executors or administrators, do and shall, immediately or as soon as convenient *after the decease of my said wife*, sell and absolutely dispose of, convey and convert into money all the said residue of my said estate and effects,

Testator gave his residuary real and personal estate to trustees, in trust to pay the rents, interest and dividends thereof, to his wife for her life, and, *after her decease*, to sell, convert into money, collect and get in the same, and to pay and divide the monies to arise therefrom, unto and equally between and amongst such of the chil-

dren of his sisters *Martha*, *Phebe*, *Alice*, &c., as might be living at the time of the decease of his wife, and the issue of such of them as might be then dead, in equal shares and proportions, such issue only to take the share which their respective parents would have taken if living; provided such children or issue should then have attained twenty-one, otherwise to pay to them the interest of their shares until they should attain that age, and then to pay them the principal. The testator's wife survived him. Each of his sisters had several children. A child of *Martha* died before the testator's wife, leaving children, and one of those children also died before the testator's wife: Held, nevertheless, that that one took a vested and transmissible interest in the testator's residuary estate.

1846.

LYON
v.
COWARD.

either by public auction or private contract, in such manner as they, or the survivors or survivor of them, his executors or administrators, shall think proper, for the best price and prices and most money that can be reasonably had or gotten for the same, or which they, or the survivors or survivor of them, his executors or administrators, in their or any of their judgment, shall think so; and also collect, get in, and receive all sums of money which may be due upon mortgage or other security or securities; and, after payment of the costs, charges, and expenses attending such sale or sales, and the calling in such sum or sums of money as aforesaid, upon trust that they, the said *James Trotter, John Bibby, and Thomas Trotter*, or the survivors or survivor of them, his executors or administrators, *do and shall pay, distribute and divide* the monies to arise from such sale or sales and to be collected, got in, and received as aforesaid, *unto and equally between and amongst such of the children* of my sisters, *Martha Lyon, Phebe Lewis, Alice Davies, Hannah Cook* by her late husband *Thomas Cook*, and of my late sisters, *Elizabeth Skillicorn, Margaret Plant, Mary Hill, and Ellen Trotter*, as may be living at the time of the decease of my said wife, and the issue of such of them as may be then dead, in equal shares and proportions, such issue, respectively, however, only to take and be entitled to the share or shares which his, her or their parent or parents would have been entitled unto and taken if living, provided all the children of my said sisters or the issue of such deceased children, may then have attained the age of twenty-one years, otherwise, only to pay or transfer, unto such of them as may have attained the said age of twenty-one years, his, her or their proportionate share of the said residue of my estate, and paying only the interest and produce of the proportionate part or share of such child

or children, or the issue of such deceased child or children, as may not have attained the said age at the decease of my said wife, to and for the use and benefit of such child or children, or the issue of such deceased child or children, until they shall respectively attain the said age of twenty-one years; and, on their respectively attaining that age, then upon trust to pay, distribute and divide to each of them respectively, their respective shares of the said residue of my estate."

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COWARD.

The testator died in 1824. *Phebe Lewis* died in his lifetime. *Martha Lyon*, *Alice Davies*, and *Hannah Cook* died before his widow. *Martha Lyon* had issue five children, all of whom were living at the testator's death. Three of them died before his widow. One of those three had two children, *Abel Lyon* and *Thomas Lyon*. *Thomas* died shortly before the testator's widow; *Abel* survived her, and was a Plaintiff in the cause. *Phebe Lewis* had two children, the issue of her first marriage. One of them, whose name was *Thomas Ward*, died in the testator's lifetime, leaving four children. One of the four, whose name also was *Thomas Ward*, survived the testator, but died before the testator's widow. She died in 1843.

On the hearing of the cause for further directions, the question was whether the interests of the grandchildren of the testator's sisters under his will, were vested, or were contingent on their surviving the testator's widow.

Mr. *Stuart* and Mr. *Prior*, for the Plaintiffs, said that the interests of the grandchildren of the testator's sisters were contingent on their surviving the testator's widow; for the will contained no gift except in the

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COWARD.

direction to pay, and that the time of payment was death of the testator's widow; and, as *Thomas 1* and *Thomas Ward* the younger, died in her lifetime interest in the testator's residuary estate vested in the *Bennett v. Merriman* (a); *Billingsley v. Wills* (b).

Mr. *James Parker* and Mr. *Follett*, for the personal representatives of *Thomas Lyon* and *Thomas Ward* the younger, said that the word "issue" in the will, meant "children;" *Pruett v. Osborne* (c); and that there was nothing in the will to shew that the words, "living at the decease of my said wife," applied to the children of the testator's sisters; that, in *Billingsley v. Wills*, it was impossible to ascertain the persons who were to take, until the time of payment, and that the time of payment in the present case, was the attainment by the children and their children, of the age of twenty-one. [The *Vice-Chancellor*.—Are not the issue of a deceased child to take their parent's share as joint tenants?] No; they are to take it in equal shares in proportions, and, consequently, as tenants in common.

Mr. *Spurrier* appeared for another party.

The VICE-CHANCELLOR :

In this, as in every other case in which I am called upon to put a construction upon the language of a written instrument, I must consider what the words used by the author of the instrument, naturally import; and although a contingency may have happened which I did not contemplate, I must give effect to the words which he has used.

(a) 6 Beav. 360.

(b) 3 Atk. 219.

(c) *Ante*, Vol. XI., p. 134.

The testator in the present case, plainly contemplated, with regard to the children of his sisters, that they, or some of them at least, might die, in the lifetime of his wife, leaving issue : but it is not equally plain that he contemplated that any child of his sisters might die, in the lifetime of his wife, leaving issue, which issue, also, might die in the lifetime of his wife. But, whether he did or did not contemplate that event, if the words which he has used are sufficient to carry a share of his property to the issue so dying, I cannot take it away, merely because it may be supposed that the testator, if his attention had been called to that state of circumstances, would have said that he did not intend his words to have such an effect.

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COWARD.

The testator directs his trustees to sell and convert into money, and to collect, get in and receive all the residue of his estate and effects, as soon as convenient after the decease of his wife ; and to pay, distribute and divide the monies to arise from such sale or sales and to be collected, got in and received as aforesaid, unto and equally between and amongst such of the children of his sisters as might be living at the time of the decease of his wife, and the issue of such of them as might be then dead, in equal shares and proportions : and I am of opinion that, inasmuch as the words : " between and amongst such of the children of my sisters," precede the gift of the whole*, the words : " in equal shares and proportions," which occur afterwards, must be taken to be applicable to the issue. The words, then, are : " such issue only to take and be entitled to the share or shares which his, her or their parent or parents would have been entitled to and taken if living." So that the children living at the death of the widow, are all to take equally ; and the issue of a child then dead, are to take,

* *Sic.*

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equally amongst them, the share which their deceased parent would have taken. In this latter clause the testator seems to take it for granted that the issue of a deceased child would survive his wife; and he directs that they shall take and be entitled to the share which their parent would have been entitled to and taken, if living. As then the share of a deceased child is given to the issue of that child, generally, and as they are to take it in equal shares and proportions, I shall declare that, according to the true construction of the will, *Thomas Lyon* and *Thomas Ward* the younger, took vested interests transmissible to their principal representatives, in the residuary estate of the testator, and that the Defendants *Peter Ball* and *Henry Heatley Ward*, their personal representatives, are entitled to their shares respectively (d).

The testator's sisters having had twenty-three children amongst them, the order on further directions declared that, according to the true construction of the will, the residuary real and personal estate of the testator was divisible into twenty-three parts or shares, which became vested, as personal estate, in the persons thereafter mentioned, (that is to say), one of such parts or shares in the Plaintiff *Abel Lyon*, and in *Thomas Lyon* deceased, in equal shares as tenants in common, another of such parts or shares in the Defendants, *John Ward*, *Henry Heatley Ward*, and *Phebe Ann Ward*, (who were the surviving children of *Thomas Ward* the elder), and in *Thomas Ward* the younger, deceased, in equal shares as tenants in common, &c., &c.

(d) See *Macgregor v. Macgregor*, 2 Coll. 192.

PARKIN v. HODGKINSON.

1846:
29th May.

Vesting.
Will.
Construction.

THE testator in this cause, after giving a house and an annuity of 300*l.* to his sister for her life, and making bequests to other persons, proceeded thus: "as to all the rest, residue and remainder of my real and personal estate whatsoever and wheresoever, subject to the life estate hereinbefore given and to the payment of the legacies hereinbefore contained, I give, devise and bequeath the same to my dear nephews, *George Parkin, Benjamin Parkin* and *James Parkin*, the children of my deceased brother *James Parkin* and *Sarah* his wife, and to their heirs, executors, administrators and assigns for ever, as tenants in common and not as joint tenants, with cross-remainders between them as to my real estate, and with benefit of survivorship as to my personal estate, in case any of them should die before their shares in the trust property shall become *vested in them* respectively; which I desire may not be *shared till the decease of my dear-est sister aforesaid and my youngest nephew arrive at the age of twenty-four years.* And I direct my executrix, executors and trustees hereinafter named (who are to have the management of my real estate during the minorities of my said nephews), by and out of the rents, issues and profits of my said residue of real and personal estate, to advance, in addition to what has been left them by their uncle, *George Parkin*, such sum and sums of money as may be wanted for the maintenance and education of my said nephews respectively during their minorities. It is my wish that they shall all finish their education at some of the great public schools, and,

Testator gave the residue of his real and personal estate to trustees in trust for his three nephews, their heirs, &c., as tenants in common, with cross remainders and benefit of survivorship, in case any of them should die before their shares in the trust property should *become vested* in them; which he desired might not be *shared* until his youngest nephew should attain twenty-four; and he directed his trustees to maintain and educate them, out of the income of the property, during their minorities. The nephews were infants at the testator's death.

Held, nevertheless, that they took vested interests under the will.

1846.

PARKIN

v.

HODGKINSON.

my nephew *George* especially, be sent either to *Oxford* or *Cambridge* University. I also direct that they should be brought up either to professions or business."

The testator died in May 1836 : at his decease, all his nephews named in his will, were infants ; and his nephew, *George*, was his heir. His sister died in January 1843.

In June 1843 the bill was filed by *James Parkin*, who was still under age, against the surviving executor of the will, and *George* and *Benjamin Parkin*, (both of whom had attained twenty-one), and the executors of the testator's sister and an incumbrancer on *George Parkin*'s share of his late uncle's property, praying that the rights of all parties under the will might be declared and that the trusts of the will might be performed under the direction of the Court.

Mr. *Stuart* and Mr. *Simpson* for the Plaintiff, and Mr. *Lloyd* for the other nephews of the testator, said that their clients took vested interests in the testator's residuary real and personal estate ; for there was a clear gift of it to them ; and provision was made for their maintenance ; and that the will contained a direction as to the time at which the property should be shared amongst them, but no direction as to the time at which it should vest in them.

Mr. *Hall*, for the executors of the testator's sister, who was one of his next of kin, said that it was clear, from the will, that the testator did not intend his property to vest in his nephews, until the time at which it was to be shared by them ; and that, that time not having arrived, their interests were still contingent.

The VICE-CHANCELLOR :

There is, first of all, an absolute gift to the nephews, their heirs, executors, administrators and assigns, as tenants in common. Then comes the clause: "with cross-remainders between them as to my real estate, and with benefit of survivorship as to my personal estate, in case any of them shall die before their shares in the trust property shall become vested in them." It seems to me that that clause is wholly void: but, if any meaning is to be attributed to it, it is: "if any of them shall die in my lifetime." Then follows the clause: "which I desire may not be shared till the decease of my dearest sister and my youngest nephew arrive at the age of twenty-four years." That is a direction solely as to the sharing, and not as to the vesting of the property.

Declare that, on the testator's decease, his residuary real and personal estate vested absolutely in his nephews.

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PARKIN
v.
HODGKINSON.

ANDREWS v. LOCKWOOD AND ABDY.

(See *ante*, p. 153.)

THE *Lord Chancellor* reversed the order in this case, on the ground, as the Reporter was informed, that the allegation as to the delivery up of the documents, ought not to have been inserted in the plea: but his Lordship did not express any opinion upon the question whether the rule that there shall be no revivor for costs, ought to be altered, in consequence of decrees of courts of equity having, under 1 & 2 Vict. c. 110, s. 18, the same effect as judgments at law.

1848:
Mich. Term.

1848:
21st January.

Practice.
New Orders.
Publication.

—
If a cause was at issue before the Orders of May 1845 came into operation, publication in it does not pass either under the 111th Order, or by giving rules according to the old practice: but a special order must be made for the purpose.

THOMAS v. LEWIS.

THIS cause had been put completely at issue, so long ago as the year 1816, by filing a replication and afterwards serving a subpoena to rejoin, according to the then existing practice of the Court. No further proceeding took place in the cause until November 1847; when the Plaintiff moved for leave to withdraw the replication and to file a new one in the form prescribed by the 93rd General Order of May 1845 (a): but the *Vice-Chancellor* refused the application. In December following, the Defendant moved to dismiss the bill for want of prosecution: whereupon the *Vice-Chancellor* ordered that the Plaintiff should set down the cause for hearing on or before the 15th of February then next, or the bill to be dismissed. On the 18th of December 1847, two witnesses, on behalf of the Plaintiff, were examined by one of the examiners of the Court.

A motion was now made, on behalf of the Defendant, that the depositions of those witnesses might be suppressed, on the ground, stated in the notice of motion, that the witnesses had been examined *after publication in the cause had passed*.

Mr. *Bethell* and Mr. *Terrell*, in support of the motion, said that the Orders of May 1845, applied to all suits that were pending (as the present was) on the 28th of October 1845, when those Orders took effect (b), and that the 111th Order directed that publication should

(a) See Beavan's Ord. 319.

(b) Ibid, 273 & 379.

pass, without rule or order, on the expiration of two months after replication filed; and, as the replication in the present case, had been filed in 1816, the witnesses named in the notice of motion, were examined long after publication in the cause had passed.

1848.

THOMAS
v.
LEWIS.

Mr. *Stuart* and Mr. *Renshaw*, for the Defendant, said that the cause was put at issue, according to the old practice, many years before the New Orders were promulgated; and therefore it was *dehors* those Orders; and that the replication spoken of in them, by the filing of which the times for examining witnesses and passing publication, were regulated, was a replication in the form prescribed by the 93rd Order, and not a replication in the old form; and, consequently, that publication in the cause could not pass according to the 111th Order, but rules to pass it must be given, according to the old practice: *Wheatley v. Wheatley (c)*.

Mr. *Bethell*, in reply, said that *Wheatley v. Wheatley* decided that rules to pass publication could no longer be given: that, on the 28th of October 1845, the old practice was abolished as to every cause then pending, whatever might be its state, and, thenceforth, the proceedings in it must be regulated by the new practice: that the affidavit in support of the motion made by the Plaintiff in November 1847, stated that the Plaintiff could not examine witnesses without filing a new replication; but the Court refused the motion: that the present application was decided, in effect, by the result of that: that, when the motion to dismiss for want of prosecution was made, the Court ordered the Plaintiff to set down the cause for hearing on or before a certain

1848.

THOMAS
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LEWIS.

day, or the bill to be dismissed: that that order was made in conformity to the fourth^d article of the 114th Order of May 1845 (*d*): that the motion must have wholly failed, if the Court had been of opinion that the case was governed by the old practice; for, according to that practice, a cause at issue could not be dismissed: therefore the Court, on two occasions, had treated the cause as within the Orders of May 1845; and what then took place was decisive of the present application: *Lovell v. Blew* (*e*), *Spencer v. Allen* (*f*).

THE VICE-CHANCELLOR:

It is quite plain that the course of proceeding prescribed by the Orders of May 1845, must be pursued with regard to every cause in this Court, whether it was pending when those Orders came into operation, or was commenced afterwards. But I do not understand that, if a cause had been at issue in September 1845, it would not have been competent, to either party, to examine witnesses, after October 1845, in the usual manner; notwithstanding the 111th Order says that publication is to pass, without rule or order, on the expiration of two months after replication filed. When the applications were made to me in November and December 1847, (the first of which was for leave to withdraw the old replication and to file a new one, and the other to dismiss the bill for want of prosecution), I had not the least notion that publication in the cause had passed; but I refused the first application, because it appeared to me not to be right to make the order after so great a lapse of time. The consequence was that every thing was left in the same state as it was in before.

(*d*) See Beav. Ord. 330. (*e*) *Ante*, Vol. XIII., p. 492.

(*f*) 4 Hare, 455.

When the second application was made, it seemed to me that, although no effective step had been taken in the cause for a great length of time, I was not at liberty to act upon the New Orders; but that the case was one in which I was called upon to make a special order; and, therefore, I directed the Plaintiff to set down his cause on or before the 15th of February 1848, or the bill to be dismissed. I have not the least conception that, on either occasion, I proceeded on the ground that publication in the cause had passed. I thought that justice required that the bill should not be, peremptorily, dismissed; but that some time ought to be allowed in order to enable the parties to put the cause into such a state as that the Court might hear it; and I meant that, during the time which I thought proper to allow, the parties should be at liberty to do what, by the constitution of the cause, they were at liberty to do.

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 THOMAS
 v.
 LEWIS.

As, then, it has not been shewn that publication has passed in this case, I must assume that it has not passed; and, therefore, the ground on which I am asked to suppress the depositions does not exist.

I desire to have it understood that I adhere to the decisions in *Wheatley v. Wheatley* and *Lovell v. Blew*: but I am of opinion that that has not occurred in this case, which has made the ground on which I am asked to suppress the depositions, and, therefore, I shall refuse the application; but I will make an order that publication do pass on the 14th of February next, the day before the cause is to be set down; and that the costs of this motion shall be costs in the cause.

1848:
26th January.

DAVIS v. CHANTER.

(See *ante*, Vol. XIV., page 212, and *ante*, pages 91

ON this day, the *Lord Chancellor* delivered an immediate judgment upon the objection, for want of proof founded on the limited nature of the letters of administration taken out to *Ann Chanter*.

The conclusion which his Lordship came to, was that *Ann Chanter* was sufficiently represented for the purposes of the suit, by virtue of those letters of administration.

1848:
29th January.

WHITE v. BRIGGS.

(See *ante*, page 33.)

THE *Lord Chancellor* finally disposed of the matter in this cause, by dismissing the petition of *Charles Herbert White* and *Georgiana Jubilee* his wife directing that the real estates should be limited to the testator's widow for life, remainder to *Charles Herbert White* for life, with remainders to his first and second sons, successively, in tail male, with remainder to his daughters, as tenants in common in fee; that the real estate, &c., should be made heir-looms to the real estate; that the residuary personal property should be left to the widow for life, with remainder to *Charles Herbert White* for life, with remainder to all his children, joint-tenants, their executors, &c.; and, on the death of the testator under twenty-one and without issue, and daughters under that age and unmarried, to *Charles Herbert White*, his executors, &c.

CRADOCK v. PIPER.

1846 :

5th June.

SPECIALTY creditors having exhausted the personal estate of their deceased debtor, which amounted to 3,500 *l.*, a decree was made in 1839, for marshalling the debtor's assets. It directed, in the usual manner, that the simple contract creditors should stand in the place of the specialty creditors, and receive satisfaction, to the extent of the personal estate, out of the debtor's real estates.

A considerable time elapsed before the real estates could be made available for the purposes of the decree : and the simple contract debts amounted to more than 3,500 *l.* Under those circumstances,

Mr. *Bethell* and Mr. *Sidebottom* contended that, as the decree had directed that the simple contract creditors should stand in the place of the specialty creditors, they ought to stand in the place of the specialty creditors with respect to the interest as well as the principal of their debts ; and, consequently, that the interest which would have accrued on the specialty debts had they remained unsatisfied, as well as the 3,500 *l.*, ought to be raised out of the real estates and applied towards payment of the simple contract debts.

The VICE-CHANCELLOR :

By law, simple contract creditors cannot claim payment of their debts out of the personal estate of their debtor, as against the specialty creditors. But courts

Simple contract Debts.
Marshalling Assets.
Debtor and Creditor.
Administration.

Specialty creditors having exhausted their debtor's personal estate, a decree was made for marshalling his assets. A considerable time elapsed before the real estates could be made available for the purposes of the decree.

Held, that the simple contract creditors were not entitled to have the interest which would have accrued on the specialty debts if they had remained unsatisfied, as well as the amount of the personal estate, raised out of the real estates and applied

towards satisfaction of their debts.

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of equity have long been in the habit of giving them compensation, out of the real estates, to the extent to which the personal estate has been exhausted by the prior claims of the specialty creditors. The simple contract creditors, however, are not entitled to have a larger fund, for payment of their debts, than they had originally.

1846:
25th June.

COOKSON v. LEE.

New Orders.
Infant.
Guardian.
Practice.

AFTER an infant Defendant had appeared voluntarily, the Plaintiff moved, under the 32nd General Order of May 1845 (*a*), that *James Johnson*, a solicitor of the Court not towards the cause, might be appointed guardian to the infant Defendant, by whom he might answer the bill and defend the suit.

After an infant Defendant had appeared, the Plaintiff moved, under the 32nd Order of May 1845, that *J. S.*, a solicitor, might be appointed the infant's guardian, to answer the bill and defend the suit.

Held that, as the infant had appeared, the Court might grant the motion on an affidavit stating, merely, that notice of the motion had been

The affidavit in support of the motion, stated that notice of the motion had been served, *on the solicitor* who had appeared for the infant, after the expiration of the time allowed for answering the bill, and more than six days before the hearing of the motion. The question, raised by the Registrar, was whether the notice ought not to have been left at the dwelling-house of the person with whom or under whose care the infant was at the time of serving the subpoena to appear and answer, and whether there ought not to have been an affidavit of the service of the subpoena, and of the notice of motion having been so left.

(*a*) See Beav. Ord. 296.

served on the *solicitor* who had entered the appearance, after the expiration of the time allowed for answering, and more than six days before the hearing of the motion.

Willcock appeared in support of the motion.

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The *Vice-Chancellor* said that, as the infant had appeared, the service of the notice of motion on the solicitor who had entered the appearance, was sufficient, and an affidavit of the service of the subpoena was not necessary; and, therefore, he should make the order.

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HENDERSON v. EASON.

1846 :
1st July.

THIS was a suit for the administration of a testator's estate. The Defendant, *Eason*, was the brother and executor of the testator, and had suffered the testator, for several years before and down to the time of his decease, to continue in the exclusive *occupation* of a farm, of which they were tenants in common in fee in equal shares, without receiving or demanding any rent or remuneration from him.

Tenant in common.

The question, on the hearing of a petition and cross petition presented by the Defendant and the Plaintiffs respectively, was, whether the Defendant was entitled to claim, out of the testator's estate, a moiety of the value of which the *Master*, in pursuance of a claim made by him, had found to be the amount of a fair occupation, for the entirety of the farm, during the last six years before the testator's death. The Defendant's claim was that the *Master*, extended over the whole period of the testator's occupation; but the *Master* considered that it was barred, by the Statute of Limitations, except for the last six years.

One of two tenants in common of a farm, permitted the other to occupy and cultivate it, without demanding any rent or other remuneration from him; but, after his death, claimed compensation out of his estate.

The *Vice-Chancellor* allowed the claim: but the *Lord Chancellor*, on appeal, doubted whether it could be maintained, and directed an action to be brought.

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Mr. *Bethell* and Mr. *Shobbeare*, in support
Defendant's petition :

If one tenant in common of an estate has the exclusive possession of it, his co-tenant may bring an action of account against him, or against his executor or administrators if he be dead, under the 4 & c. 16, s. 27. But the petitioner is precluded from bringing the action, by being, himself, the exclusive tenant who has been in possession. A Court of equity, however, will give him the same relief for that circumstance, he might have obtained under the 3 & 4 Will. 4, c. 27, s. 12, *reversed* the impediments which before existed against a tenant in common suing his co-tenant. It enacts that where one or more of several joint-tenants, tenants in common, or co-parceners of land, shall have been in possession of the entirety of it for his or their own use and occupation, such possession shall not be deemed to be to the exclusion of the person or persons entitled to the other shares of the land. So that it places the co-tenant in common who is in possession, and his co-tenant out of possession, on the footing of strangers to each other. Therefore, under that act, tenants in common may bring all the same actions against each other as strangers may. And as, if what has occurred in the present case had occurred between strangers, an action of use and occupation would have lain ; so, under the act, the petitioner might have maintained an action of use and occupation against the testator in his lifetime. *Verley v. The Lincoln Gas Light Company* then the petitioner has a clear legal right, but on account of accidental circumstances, cannot enforce it. In this Court will interpose and give effect to his

Anderdon, Mr. *Rolt*, and Mr. *Bagshawe*, for the
 fs and other parties to the cause, said that the
 did not enter into the occupation of the farm
 ny express contract with the petitioner; and
 contract arose between them, by implication of
 it was laid down, by Lord *Coke*, that, albeit one
 n common take the whole profits, the other hath
 dy by law against him (*b*): that the only action
 ne tenant in common could bring against his
 at, was an action of account under the 4th & 5th
 . 16, sect. 27 (*c*); but that action was given only
received (*c*), and therefore it would not lie in the
 case; for the farm had not been let, but had been
 l and cultivated by the testator himself: *Wheeler*
e (*d*); *Sturton v. Richardson* (*e*); *MacMahon v.*
l (*f*). That the 3rd & 4th Will. 4. c. 27, did not
 tenant in common in possession liable to ac-
 his co-tenant, but merely made his possession

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v. Lit. 199. b.
 he section enacts
 ions of account shall
 y be brought and
 ed against the exe-
 nd administrators of
 uardian, bailiff and
 ; and also by one
 nant and tenant in
 , his executors or
 rators, against the
 ; bailiff, for receiving
 an comes to his just
 or proportion, and
 the executor and ad-
 tor of such joint-ten-
 tenant in common;
 auditors appointed by

the Court where such action
 shall be depending, shall be
 and are hereby empowered
 to administer an oath and
 examine the parties touching
 the matters in question, and,
 for their pains and trouble in
 auditing and taking such ac-
 count, shall have such allow-
 ance as the Court shall ad-
 judge to be reasonable, to be
 paid by the party on whose
 side the balance of the ac-
 count shall appear to be.

(*d*) Willes, 208.

(*e*) 13 Mee. & W. 17.

(*f*) 3 Hare, 97; 2 Phill.
 127.

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adverse with respect to the co-tenant ; and that, petitioner had no right to what he asked, at could have none in equity.

The VICE-CHANCELLOR :

The act of the 3rd & 4th Will. 4 does not at all interfere with the action of account given by the act & 5th Anne, but leaves it just as it was before. It enacts that the possession of one tenant in common shall be the possession of him alone, and not the possession of his co-tenant or co-tenants. Consequently, under the act, the petitioner might have maintained, first, an action of ejectment, and then an action for *mesne* profits, against the testator. And, under the act of Anne, he might have had a right to bring an action of account against the testator ; and he would now be entitled to bring a like action against the personal representative of the testator, had he not filled that character himself. Therefore I think that the *Master* was right in allowing the claim made by him.

The *Lord Chancellor*, on appeal, doubted whether the claim ought to have been allowed until the petitioner had established his right at law ; and therefore the Lordship ordered him to bring an action (under the act of Anne) in which he was to be Plaintiff, and the testator's executors Defendants, they admitting, for the purpose of the action, that they were the executors of the testator (g).

(g) See 2 Phill. 308. The action has been commenced but has not yet been tried.

WOODIN v. FIELD *.

THE bill was filed on the 25th April 1846, and an *ex-parte* injunction was obtained on the same day. The Defendant gave notice that he should move to dissolve the injunction on the 22nd of May, and, afterwards, filed several affidavits in support of the intended motion. The motion was brought on, but was ordered to stand over, at the request of the Plaintiff, he consenting that the injunction should not operate during the suspension of the motion. The Defendant filed his answer on the 23rd of May; after which, down to the 3rd of June, the Plaintiff filed several affidavits in opposition to the motion. The motion was brought on again on the 4th of June, when

Mr. James Parker, (with whom were Mr. Webster and Mr. Westoby), for the Plaintiff, proposed to read the affidavits filed after the 23rd of May.

Mr. Bethell and Mr. Beavan, for the Defendant, objected to the affidavits being read, on the ground that they were filed after the answer.

The *Vice-Chancellor* allowed the objection.

* *Ex relatione.*

1846:
4th June.

Affidavits.
Motion.
Practice.

Defendant moved, on affidavits, to dissolve an *ex-parte* injunction. The motion stood over at the Plaintiff's request. The Defendant then filed his answer: after which the Plaintiff filed several affidavits. On the motion being resumed, those affidavits were held to be inadmissible.

1846:

2nd July.

*Husband & Wife.**Savings.**Separate Property.**Settlement.**Construction.*

By a marriage settlement, after reciting that the lady was entitled to real and personal property, and that it had been agreed that she should settle it, and also all other

property to which she might become entitled during the coverture, upon the trusts thereafter mentioned: all her then property was vested in trustees in trust, during her life, to pay and *apply* the income to such person or persons as she, from time to time, by any writing or writings signed by her, should appoint, and, in default of such appointment, to her for her separate use, and, after her death, to pay 500 *l.* a-year to her husband for his life: and the settlement declared that, subject to those trusts, all the trust property and all the annual produce of it which might *remain unapplied* at her death, should remain upon the trusts thereafter mentioned; none of which were for the benefit of her husband. The trustees received the income of the settled property and, with the lady's privity and acquiescence, paid it into a bank, in their own names, and made remittances to her from time to time as she required money. She and her husband separated soon after their marriage; and she died in his lifetime. At her death 888 *l.* were in her house, and a balance of 2,049 *l.*, arisen from the income of the settled property received by the trustees, was standing to their credit in the books of the bank. Held that the husband was entitled to the 888 *l.*; but that the 2,049 *l.* were subject to the ultimate trusts of the settlement, as being annual produce *remaining unapplied* at the wife's death.

JOHNSTONE v. LUMB.

BY the settlement on the marriage of *Elizabeth Johnstone* with the Plaintiff *Thomas Johnstone*, dated the 11th March 1831, after reciting that *Elizabeth Johnstone* was seised in fee of the freehold and copyhold tenements therein mentioned, and absolutely entitled to the sums of money and stock in the funds and the canal shares, therein also mentioned, and to the household furniture, linen and other effects in and about her dwelling-house; and that, upon the treaty for the marriage, it was agreed that she should settle the property to which she was so entitled, and also *all other property to which she might become entitled during her intended coverture*, upon the trusts after mentioned; and that, in pursuance of such agreement, she had assigned and transferred the mo-

nies, stock, canal shares, furniture, linen, &c., to and into the names of *William Kershaw, Richard Kershaw Lumb*, and *John Grimshaw*: she conveyed and covenanted to surrender the freehold and copyhold tenements to them and their heirs. The settlement then directed the trustees to permit *Elizabeth Johnstone* to use and enjoy the furniture, linen, &c., for her separate use during her life, and, after her death, to permit *Thomas Johnstone* to use and enjoy them for his life; and, immediately after the solemnization of the marriage, to set apart so much of the trust-funds as would produce 66*l.* 13*s.* *per annum*, and to pay such annual produce to the widow of her late brother, for life; and, *during the life of Elizabeth Johnstone*, to pay and apply the annual produce of the residue of the trust-funds, and the yearly rents and produce of the freehold and copyhold tenements and other trust premises, to such person or persons only and for such purposes only as *Elizabeth Johnstone*, notwithstanding her intended coverture, should, from time to time, *by any writing or writings signed by her with her own hand*, appoint, but not so as to deprive herself, while under coverture, of the benefit thereof by way of anticipation; and, in default of and until such appointment, into the proper hands of *Elizabeth Johnstone*, for her separate use, exclusively of the Plaintiff and of every other husband whom she might marry, and without being, in anywise, subject to his debts, control, interference or engagements; and, after the decease of *Elizabeth Johnstone*, in case the Plaintiff should survive her, to set apart so much of the trust-funds and securities as that the annual produce thereof should produce the clear annual sum of 500*l.*, and, from time to time, to pay the annual produce of the fund so set apart, to the Plaintiff and his assigns during his life, by equal half-yearly payments, and to make the

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first payment thereof at the end of six calendar months next after the decease of *Elizabeth Johnstone*. The settlement then declared that, subject to the trusts aforesaid, all the said several trust monies, stocks, funds, securities and premises, and all the annual profits and yearly rents and produce which might remain *applied* at the decease of *Elizabeth Johnstone*, should after her decease, remain upon the trusts therein mentioned; which were to raise and pay the expenses incident to the funeral of *Elizabeth Johnstone*, certain sums, in the nature of legacies, to individuals and charities, and to divide the residue amongst certain persons therein named. And, in further pursuance of the said agreement and in consideration of the intended marriage, the Plaintiff and *Elizabeth Johnstone* covenanted, jointly and severally, with the trustees, that in case their then intended marriage should take effect, any real or personal estate should, at any time or during their joint lives, devolve upon or vest in *Elizabeth Johnstone* or in the Plaintiff and her in her right, in any such real or personal estate as she was then entitled to in reversion, remainder or expectancy, and whether vested or contingent; she and the Plaintiff and each of their heirs, executors and administrators and all other necessary parties, would make, do and execute all such acts and deeds as should be necessary for effectually assuring all the said real and personal estate respectively, unto the trustees for the time of the settlement, upon the trusts therein declared concerning the said freehold and copyhold hereditaments and the said trust monies, stocks, funds and securities respectively.

The Plaintiff and his wife separated from each other soon after their marriage. In 1832 she signed a

writing by which she directed that *any money which might be in her house at her decease*, as well as any other *savings which she might have made out of her income from the time of her marriage*, should be given to the Plaintiff in case of his surviving her. In July 1844 she died; and letters of administration of her effects, with the paper-writing annexed, were granted to the Plaintiff. At her decease, she had, in her house, 888*l.* 4*s.*, which the bill alleged to be part of the savings of the income of her separate property under the settlement; and, at the same time, 2,049*l.* 7*s.* 2*d.* was standing in the names of *Lumb* and *Grimshaw*, the surviving trustees of the settlement, in the books of the *Halifax Commercial Bank*; and the bill alleged that that sum was constituted of or derived from the income of the settled property which the trustees had received in the lifetime of *Elizabeth Johnstone*, but had not paid to her.

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The Plaintiff insisted that he was entitled to the 888*l.* 4*s.* and 2,049*l.* 7*s.* 2*d.*, either by his marital right or as his wife's personal representative, as being savings of his late wife's separate income.

The Defendants submitted that those sums were subject to the trusts declared by the settlement to take effect after the death of the Plaintiff's wife, either as annual produce remaining unapplied at her death, or as being subject to the operation of the covenant, contained in the settlement, for settling any real or personal estate which should, at any time or times during the joint lives of the Plaintiff and his wife, devolve upon her or upon him in her right.

The decree at the hearing, directed the *Master* to inquire and state what money or cash was in the wife's

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house belonging to her at the time of her death ; and whether the same or any and what part thereof, was derived from or constituted her separate estate, and from what source the same (if any) was derived, and what had become thereof, and whether any interest had been made thereon and by whom, since her decease : and also what sum of money derived from the rents, profits and income of the trust estates, stocks, funds and securities in the pleadings mentioned, or from interest or accumulations of interest thereon, was, at the wife's decease, in the hands of the Defendants, *Lumb* and *Grimshaw* as the surviving trustees of the settlement, or was standing to their credit at any banker's, and under what circumstances the same remained in their hands or standing to their credit, and what was due in respect thereof, and whether any and what interest thereon had been made since the wife's decease.

The *Master* found that, at the wife's decease, 888 *l.* 4*s.* cash was in the house belonging to her, and that it was part of the savings of her income and was derived from her separate property, and that, upon or after her death, *Lumb* and *Grimshaw*, the surviving trustees, took possession of it and deposited it with the *Hatifax* Commercial Banking Company, where it remained in deposit until the 26th of May 1825, when they withdrew it, together with 13 *l.*, the interest allowed thereon by the bank, and invested the amount in the manner after mentioned : and that, for some years previous to the marriage of the Plaintiff with his late wife, *William Kershaw* managed and received the income of the greater part of her real and personal property ; out of which he remitted to her, from time to time, such sums of money as she required, the surplus being invested, by him, from time to time, according to her directions ; and

that, after the marriage, *Kershaw* continued to manage her pecuniary affairs and to receive the greater part of her income from the settled property down to the period of his death; and, with her privity and acquiescence, paid the monies so received by him into the *Halifax* Commercial Bank, in the names of himself and of *Lumb* and *Grimshaw*, as trustees of the settlement; and that various sums were, from time to time, remitted to her as she required the same; and that, after *Kershaw's* death, *Lumb* received such portion of the income of the settled property as had been received by *Kershaw*, and the monies so received were regularly paid by him into the same bank, to the account of himself and *Grimshaw* as the surviving trustees of the settlement, and that various sums amounting, on an average, to 800 *l.* a-year, were, from time to time, remitted to the Plaintiff's late wife, when and as she required money; and that, every year, *Lumb*, on behalf of himself and *Grimshaw* as such surviving trustees, sent to her a full account of all monies received and paid by them on her account, which shewed, also, the balance from time to time in the bank placed to their account, and which she allowed to remain there; interest being, from time to time, allowed by the bank for the same and carried to the account of the trustees in their account current with the bank: the *Master* further found that, at the wife's decease, 2,049 *l.* 7 *s.* 2 *d.* was the amount remaining in deposit at the bank and there standing to the credit of *Lumb* and *Grimshaw* as the surviving trustees, and that the same was made up and consisted of the monies left in the bank from time to time as aforesaid, and was derived from the income of the settled property, together with such interest as was allowed to the trustees as before mentioned: and that, on the 26th of May 1845, *Lumb* and *Grimshaw* withdrew the 2,049 *l.* 7 *s.* 2 *d.*,

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together with 41 *l.* 5 *s.* 7 *d.*, the interest allowed thereon from the decease of the wife, and invested those sums and also the 888 *l.* 4 *s.* and 13 *l.* (except 3 *l.* which still remained in their hands) in the purchase of 3000 *l.* Three per cent. stock, and that the same was still standing in their names.

The cause now came on to be heard for further directions.

Mr. *Stuart* and Mr. *Lloyd* for the Plaintiff, said that, by the testamentary paper, Mrs. *Johnstone* had given, to the Plaintiff, any money which might be in her house at the time of her decease, as well as any other savings which she might have made, out of her income, from the time of her marriage: that the sum of 888 *l.* 4 *s.* was in her house at her decease, and the 2,049 *l.* 7 *s.* 2 *d.* was savings which she had made out of her income from the time of her marriage; and that, as the settlement empowered her to dispose of her income, by any writing signed by her with her own hand, and as the testamentary paper was so signed, the Plaintiff became and was entitled, under it, to the 888 *l.* 4 *s.* and 2,049 *l.* 7 *s.* 2 *d.*: but if not, that he became and was entitled to those sums by virtue of his marital right: *Malony v. Kennedy* (a).

Mr. *Bethell*, Mr. *James Parker*, Mr. *Jolliffe* and Mr. *Robertson*, for the trustees of the settlement and the parties beneficially interested under the ultimate trusts of it, said that the settlement was intended to answer all the purposes of a will, and not to leave any property undisposed of, with respect to which, it might be necessary to take out letters of administration to Mrs. *Johnstone*:

(a) *Ante*, Vol. X., page 254.

that the 888 *l.* 4*s.* and the 2,049 *l.* 7*s.* 2*d.* were part of the annual produce of the trust monies, stocks, funds and securities which remained unapplied at Mrs. Johnstone's decease, and, as such, were subject to the trusts of the settlement which were to take effect after Mrs. Johnstone's decease: that, if those sums were not part of such annual produce remaining unapplied, they were bound by the covenant in the settlement, the language of which was most comprehensive, as was also the language of the reciting part of the settlement: that, at all events, they did not pass by the testamentary paper; for the power given to Mrs. Johnstone by the settlement, was to be exercised only by act *inter vivos*, and over income before it was paid to her; but the 888 *l.* 4*s.* had been paid to her, and the 2,049 *l.* 7*s.* 2*d.*, had become capital before she died.

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The VICE-CHANCELLOR:

The settlement directs the trustees to provide a fund for payment of the annuity of 66 *l.* 13*s.*, and then, during the life of Mrs. Johnstone, to pay and apply the annual produce of the residue of the trust premises, to such persons as she should, from time to time, by any writing or writings signed by her, appoint, but not so as to deprive herself of the benefit thereof by way of anticipation; and, in default of appointment, to pay it to her for her separate use. The settlement then directs that, subject to the trusts before declared, all the trust-premises, and all annual produce which might remain unapplied at the decease of Mrs. Johnstone, should remain upon the trusts thereafter mentioned, one of which was to pay her funeral expenses. Now the question is what is the meaning of the term, 'unapplied.' I think that the only meaning that can be assigned to it, is portions of the annual income not paid and applied according to the trust which was vested in the trustees.

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By that trust they were directed to pay and apply the annual income to such persons and for such purposes as the lady should, in a given manner, appoint, and, in default of appointment, to pay it to her for her separate use. If the whole had been paid to her separate use, then I should have said that the whole had been applied: whether it had been spent or not, would have been utterly immaterial. If the whole had been received by the trustees and no part of it had been paid to the lady, but a part had been appointed by her, I should have considered that the appointment by her took effect immediately, and bound the part which was the subject of that appointment, and that what would remain unapplied, would be the balance in the hands of the trustees, which had not been made the subject of any appointment. Because the mere fact that the trustees did not instantly comply with the appointment, never could vary the rights of the wife or of her husband, who took no interest by her act. Therefore, I should have held, if that case had arisen, that money so appointed would have been applied according to the true construction of the words of the settlement.

Then it appears that a certain course of dealing with the lady's income, had been pursued before her marriage; and that it was continued after her marriage, without any positive direction from her, but with her privity and acquiescence. The money was received, first of all, by one of the trustees, and, after his death, by the two surviving trustees, and placed, in their names, at a banker's, who allowed interest upon the balances which, from time to time, were standing to their credit in the books of the bank. No doubt, when it was there, Mrs. *Johnstone* might either have appointed or required the trustees to pay her the whole of it. She did not, however, do so, but some sums were paid to her; and, at the

her decease, there was a sum of 888 l. 4 s. in
 se; and, as that sum had been paid to her, it is
 r opinion that it must be taken to have been
 , and that it cannot be considered as unapplied
 he meaning of the trust to which I have adverted.

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the only question is as to the sum which was in
 ls of the bankers; and, with regard to that, I have
 two questions: did the lady make any appoint-
 it? I am not now considering the testamentary
 ment as anything. She made none. Was it paid
 ' It was not. The mere receipt of it by the
 , left it subject either to be paid as she should
 , or, in default of appointment, to be paid to her.
 re was no appointment, except by the testamen-
 per (which I will deal with presently), and there
 payment to her. Then it was said that she made
 intment by the testamentary instrument. But
 t think that any appointment could be made by a
 ntary instrument, consistently with the words of
 lement: because the settlement directs, not that
 tees should pay the income to such persons as
 y should appoint, and, in default of appointment,
 but that they should, *during her life*, pay it to
 rsons as she should, from time to time, appoint:
 erefore, the appointment ought to have been
 would have enabled the trustees to execute the
 uring her life: but an appointment which was
 ke effect until after her death, was not an ap-
 ent which fell within the words of the trust, and,
 re, was not binding upon the trustees. I think
 it is conclusive of itself; but it receives confirma-
 m the expression: "but not so as to deprive
 , while under coverture, of the benefit thereof, by
 ' anticipation;" an expression which is utterly
 cable to a testamentary instrument. But, with-

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out relying upon that, my opinion is that an appointment which was only to take effect after the lady's death, was not an appointment which affected the trust which the trustees were bound to execute, and which was a trust to operate during her lifetime. The consequence is that that sum which was neither appointed nor paid, became subject to the trusts of the settlement for the benefit of those who take in remainder.

Declare that the money which was found in Mr. Johnstone's house, belongs to the Plaintiff; but that the money which was in the hands of the bankers, is subject to the trusts of the settlement.

1846:
 3rd July.

Vesting.
Will.
Construction.

Testator directed the dividends of two sums of stock to be equally divided between all his nephews living at his decease, and, after the decease of any of them, the capital of his share to be sold and the proceeds to be divided amongst his children; and, in default of such issue, then to go and be divided amongst the children of A., and, in case all A.'s issue should be dead, then to be divided amongst the children of B. A. had four children. Three of them died; and then one of the testator's nephews died without issue.

Held that the three deceased children, as well as the surviving child of A., took vested and transmissible interests in the deceased nephews' share of the stock.

COHEN v. WALEY.

THE testator in this cause directed two sums of stock to be transferred into the names of trustees and the dividends thereof to be paid to his sister, for life, and, after her death, to be shared and divided amongst all his nephews and nieces living at his decease, each to have an equal share during his or her life; and, after the decease of any of them, the capital of his or her share to be sold, and the produce to be divided amongst his or her child or children; and, in default of such issue, then to go and be divided amongst the children of the tes-

tator's nephew and niece, *Samuel* and *Sophia Cohen*; and, in case all their issue should be dead, then to be divided amongst the child and children of *C. L. Newton* and the testator's niece *C. Newton*; and, in case their children should be all dead, then to go and be divided amongst the testator's nearest relations. And the testator directed the residue of his estate to be converted into money and invested in Consols, and the dividends to be shared and divided amongst his nephews and nieces living at his decease, in equal shares; and, after the decease of any of them, the capital of his or her share to be sold, and the produce to be paid to his or her child or children; and, in default of such issue, then to go and be divided amongst the child and children of the testator's nephew and niece, *Samuel Cohen* and *Sophia Cohen*; and, in case all their issue should be dead, then to go and be divided amongst the child or children of *C. L. Newton* and the testator's niece *C. Newton*; and, in default of such issue living, then to go and be divided amongst the testator's nearest relations.

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The testator left his sister and seven nephews and nieces him surviving. One of his nephews died before his sister, without issue. She died in 1845.

Samuel and *Sophia Cohen* had four children, one born in the lifetime and the others after the death of the testator. All of them except one (who was a Defendant) died before the testator's deceased nephew; and their father, the Plaintiff in the cause, took out administration to them, and claimed, as their representative, three-fourths of the share of the sums of stock and residue given, by the will, to the deceased nephew for his life.

Mr. *Bethell* and Mr. *Waley*, for the Plaintiff, said that the word, 'then,' in those parts of the will which regarded the children of the Plaintiff and his wife, had

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reference to the time of enjoyment, and no time of vesting; and, therefore, all the child vested interests under the will; the eldest, on the testator's death, and the three youngest, on their birth. That there was no gift over except in case all of the Plaintiff and his wife should be dead at the event had not happened. *Skey v. Barnes* (a), *Man v. Warrington* (b), *Locker v. Bradley* (c).

Mr. *Stuart* and Mr. *Whiteley*, for the Plaintiff, a daughter, said that the words: 'go and be divided,' showed that the testator intended that any child of the Plaintiff and her husband should take a vested and transmissible interest, should be living at the death of the tenant for life. That, as their client was the only child living at the death of the deceased nephew, she was entitled, exclusively, to the share of the testator's property which that nephew had been tenant for life.

THE VICE-CHANCELLOR:

The gift on which the question has arisen is, a gift to *A.* for life, and, after his death, to his children as tenants in common, and, if he should have no child living at his death, then over. In that case, if there is one child living at *A.*'s death, the gift over will not take effect, but the original gift to his children will remain in force.

I declare that, according to the true construction of the will, the four children of the Plaintiff who were living at the testator's decease, took vested and transmissible interests in the one-seventh share of the sums of stock and of the residue, to which the testator's deceased nephew was entitled for his life.

(a) 3 Mer. 335.

(b) *Ante*, Vol. XIII., p

(c) 5 Beav. 593.

ELLIOTT v. ELLIOTT.

CHARLES ELLIOTT, Esq., by his will, dated the 20th of November 1827, gave all his money in the parliamentary or public stocks or funds of *Great Britain*, to his sons, *Charles Elliott*, Esq., the Rev. *Henry Venn Elliott*, and the Rev. *Edward Bishop Elliott*, and to his friend *James Stephen*, Esq., in trust to set apart so much thereof as would produce an income of 350*l.* quarterly, and of 1400*l.* annually, and to pay the dividends of the stocks or funds so set apart, to his wife, for her life, by four instalments on the days therein mentioned; and after her decease, to retain and set apart so much of the last-mentioned stocks and funds as would produce a quarterly income of 225*l.*, or an annual income of 900*l.*, and to pay and apply the dividends of such last-mentioned stocks and funds, by four equal payments, on the days therein before mentioned, commencing with such of the said days as should first happen after the decease of his wife, in manner following: that is to say, upon trust, as to the quarterly sum of 75*l.*, being one equal third part of such dividends, to pay the same to his daughter, *Charlotte Elliott*, for her separate use, during her life, and after her death, in case there should not be any issue of her body then living, to her husband for his life; but, in case she should leave a husband and any child or children her surviving, to pay one moiety of the said dividends to her husband for his life, and after her hus-

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3rd July.

Appointment.
Power.

A testatrix, having personal property of her own and a power, under her father's will, to appoint a fund, by deed or will, amongst her brothers and sisters, after directing her debts and funeral and testamentary expenses to be paid out of her personal estate, and giving pecuniary legacies to persons not objects of the power, and a portion of the fund over which she had the power, to persons who were objects of it, bequeathed the residue of her personal estate

after payment of her debts, funeral and testamentary expenses and the before-mentioned legacies, to two persons who also were objects of the power.

Held that the residuary clause was a valid appointment of the remainder of the fund over which she had the power.

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band's death, to pay that moiety, and, after her death, to pay the other moiety of the said dividends, and to stand possessed of the stocks or funds applicable to the payment of the same dividends, in trust for such of her sons as should attain twenty-one, and for such of her daughters as should attain that age or marry; and after the decease of his said daughter, in case she should not leave any child who should live to become, entitled to a vested interest in the said stocks or funds as thereinbefore mentioned, then, subject to the estate for life thereinbefore limited to her husband (if any) to stand possessed of the share of his said daughter of and in the said stocks and funds, in trust for such one or more, exclusively of the other or others, of the testator's children or grandchildren, in such parts, shares and proportions, with such restrictions and limitations over for the benefit of any other or others of his said children or grandchildren, and in such manner and form as his said daughter, whether married or single, should, by any deed or writing, or deeds or writings, under her hand and seal, attested by two or more witnesses, or by her last will and testament, or any writing in the nature of a will, or any codicil or codicils thereto to be attested by two or more witnesses, direct or appoint, and, in default of any such appointment and so far as any such if incomplete should not extend, and as to such of the said stocks or funds whereof no such direction or appointment should be made, in trust for such person or persons as should be or would, at the time of the decease of his said daughter, be entitled thereto, as her next of kin, under the statutes made for the distribution of the estates of intestates, in case she had died unmarried and intestate, and in such and the same shares and proportions, if more than one, as they would, in that case, become entitled thereto as such next of kin. And, as to

the other two-third parts or shares of the said stocks or funds set apart, after the decease of his said wife, for the production of an annual income of 900 *l.*, and the dividends and annual proceeds thereof, the testator gave and bequeathed one of the said two-third parts or shares upon the same trusts and for the same ends, intents and purposes, and subject to the same powers and provisos in favour of his second unmarried daughter, *Mary Sophia Elliott*, since deceased, and her husband and issue (if any), or her appointees or next of kin; and the remaining third part thereof, upon the same trusts and for the same ends, intents and purposes, and subject to the same powers or provisos in favour of his third daughter, *Eleanor Elliott*, and her husband and issue (if any), or her appointees or next of kin, as he had thereinbefore directed and declared with respect to the one-third part or share thereof, and the dividends and annual proceeds thereof, given or bequeathed in favour of his eldest unmarried daughter, *Charlotte*, her husband and issue, or appointees or next of kin. And the testator directed the trustees, immediately after his decease, to set apart such further part of the said stocks and funds thereinbefore given and bequeathed to them in trust as aforesaid, as would produce quarterly dividends to the annual amount of 1050 *l.*, such dividends to be payable on the same quarterly days as were thereinbefore mentioned; and to stand possessed of the last-mentioned stocks and funds and the dividends thereof from the first quarterly day of payment after his decease, upon such and the same trusts, and to and for such and the same ends, intents and purposes, and under and subject to such and the same powers, provisos and declarations, for the benefit of his said three daughters, *Charlotte*, *Mary Sophia* and *Eleanor*, and their respective husbands (if any) and issue, and, in default

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of issue, their appointees and next of kin, as were there-
 inbefore expressed and declared of and concerning the
 stocks and funds thereinbefore directed to be set apart
 to answer and pay the annual sum of 900*l.* bequeathed
 in favour of his said daughters in manner aforesaid.
 And he appointed the trustees to be the executors of
 his will.

The testator died in 1832, and his widow died in April
 1843. His daughter, *Mary Sophia Elliott*, died in July
 following. At her death she and each of her sisters,
Charlotte and *Eleanor*, were entitled, under their father's
 will, to the dividends of 10,263*l.* Consols and 10,833*l.*
 Reduced, standing in the names of the trustees of that
 will. She made her will, dated in June 1843, and in
 the following words:

" I direct all my just debts, funeral and testamentary
 expenses to be paid, by my executors hereinafter named,
 as soon as conveniently may be after my decease, ~~out~~
 of my personal estate. I give and bequeath all my
 household furniture, plate, linen, china, books, prints,
 pictures and other household effects of which I shall
 die possessed, unto my sisters, *Charlotte Elliott* and
Eleanor Elliott, equally to be divided between them
 share and share alike. I give and bequeath to the Rev.
 Mr. *Colony Née*, of *Lime*, near *Verons* in *France*, such
 amount of stock now standing in my name in the *New*
York State stock, as shall not exceed the sum of 400*l.*
 sterling. I give and bequeath to the Rev. *John Bab-*
ington, of *Cossington*, in the county of *Leicester*, clerk,
 the sum of 100*l.* sterling. I give and bequeath to
Jane, the wife of the Rev. *Charles Bigsby*, of *South-*
borough, clerk, the sum of 100*l.* sterling. And I give
 and bequeath unto my niece, *Eugenia Money Elliott*,

daughter of my brother, the Rev. *Edward Bishop Elliott*, clerk, the sum of 100*l.* sterling. I give and devise all that my one-third part or share in a messuage and premises, *No. 37, Regency-square, Brighton*, unto my two sisters, *Charlotte Elliott* and *Ellen Elliott*, their heirs and assigns for ever, as tenants in common. I give and bequeath unto my brothers, the Rev. *Henry Venn Elliott* and the Rev. *Edward Bishop Elliot*, three-fourths of one-third of the stocks standing in the names of my trustees (namely, *Charles Elliott*, the Rev. *Henry Venn Elliott*, the Rev. *Edward Bishop Elliott* and *James Stephen*.) in the 3 per Cent. Consolidated Annuities and 3 per Cent. Reduced Annuities, in the books of the Governor and Company of the Bank of England, upon trust that they, the said *H. V. Elliott* and *E. B. Elliott*, do and shall stand possessed of the said stocks upon trust to receive the dividends, interest and annual proceeds of the said trust monies during the life of my sister, *Catherine Jane Brazier*, the wife of *Samuel Brazier*, and pay the same into her own proper hands, or, otherwise, to such person or persons as she shall, by any writing under her hand and notwithstanding her present or any future coverture, from time to time, direct or appoint, but so as not to charge or affect the same by way of anticipation, and so that the said dividends, interest and annual proceeds may be for her separate use, independently of her present or any future husband, and, from and after the decease of the said *Catherine Jane Brazier*, then upon trust to pay, assign and transfer the said stocks, funds and securities unto my nephew, *Henry Brazier*, and my niece, *Frances*, the wife of the Rev. *Charles Whish*, the two children of the said *Samuel Brazier* and *Catherine Jane* his wife, in equal shares and proportions, to and for their respective absolute use and benefit; provided always and I do

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hereby direct that, in case the said *Catherine Jane Brazier* should survive her said husband, then that the said *Henry Venn Elliott* and *Edward Bishop Elliott*, shall pay, assign and transfer the said stocks, funds and securities unto the said *Catherine Jane Brazier*, to and for her own absolute use and benefit: and in case the said *Henry Brazier* and the said *Frances Whish* shall survive their mother and die leaving no issue, then it is my will that their shares shall be distributed *among my next of kin* according to the Statute of Distributions. And I give and bequeath the other one-fourth of the one-third of the aforesaid stocks standing in the names of *my* said trustees as aforesaid, unto my nephew, *Henry Brazier*, son of my said sister, *Catherine Jane Brazier*, for his own use and benefit. And I give and bequeath unto my brother, the said Rev. *Edward Bishop Elliott*, so much of the said Government stocks as will produce the sum of 150*l. per annum*, to and for his own absolute use and benefit. And as to all the rest, residue and remainder of *my personal estate and effects* whatsoever and wheresoever, *after payment of my just debts, funeral and testamentary expenses and the before-mentioned legacies*, I give and bequeath the same unto my brother, the Rev. *Henry Venn Elliott* and my sister, *Eliza Spragge*, widow, to be equally divided between them share and share alike. And I appoint the Rev. *Henry Venn Elliott*, the Rev. *Edward Bishop Elliott* and the Rev. *John Babington* joint executors of this my will."

The testatrix's will was proved by the Plaintiff, the Rev. *Edward Bishop Elliott*, alone. The bill, which was filed by him against his co-trustees under the testator's will, and the legatees of stock and residuary legatees under the testatrix's will and her next of kin, alleged (amongst other things) that the testatrix's personal

estate not specifically bequeathed (and which was very nearly the same in amount at the date of her will) did not amount to 400*l.*; and that the same, after payment of her debts, (which did not exceed 150*l.*), and her funeral and testamentary expenses, was not sufficient to pay, in full, the legacies bequeathed by her will. The bill prayed that the rights and interests of all parties in the 10,263*l.* Consols and 10,833*l.* Reduced, and in the dividends thereof accrued since the testatrix's death, might be ascertained and declared; and that so much thereof as would produce 150*l. per annum* and the dividends thereof from the testatrix's death might be transferred and paid to the Plaintiff; and that the residue thereof might be transferred and paid to the parties entitled thereto.

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One of the Masters of the Court having found, in pursuance of an order made in April 1845, who were the testatrix's next of kin at her death, and that all of them were parties to the suit, and that the sums of stock over which the testatrix had a power of appointment under the testator's will, were such as before mentioned, the cause came on to be heard for further directions.

The question was whether the testatrix's will was a valid execution of the power given to her by the testator's will.

Mr. *James Parker* and Mr. *Roundell Palmer*, for the Plaintiff, said that the testatrix's will was a good execution of the power; for, though it did not refer to the power, it contained a clear reference to the funds which were the subjects of it; and that the Plaintiff was one of the objects of it.

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Mr. *Cooper* and Mr. *Rogers*, for *Henry Venn Elliott*, and *Eliza Spragge*, the residuary legatees under the testatrix's will, said that the testatrix, first, gave specific and pecuniary legacies out of her own personal estate, and then appointed certain portions of the funds which were the subjects of the power, to persons all of whom, except her next of kin, were objects of it; and that her next of kin *might* be objects; and that she then disposed of the remainder of those funds, as well as the residue of her own personal estate; for the words: "after payment of the before-mentioned legacies," meant the legacies of stock as well as the pecuniary legacies antecedently given: *Hales v. Margerum* (a); *Standen v. Standen* (b).

The *Vice-Chancellor*.—I should like to hear the other side.

Mr. *Bethell* and Mr. *John Baily*, for parties entitled to the funds in default of appointment under the testator's will, said that the testatrix's will contained no reference whatever to the power, and that the funds which it referred to and purported to dispose of, were stocks standing in the names of *her* trustees, which words did not apply to the funds in question: but, assuming that certain parts of the funds were duly appointed by the prior parts of the will, there was no ground whatever for saying that the residuary clause included the remainder of them; for that clause had reference only to the testatrix's own personal estate, which, by law, as well as by the express terms of her will, was subject to the payment of her debts and funeral and testamentary expenses; but the funds over which she had a power of

(a) 3 Ves. 299.

(b) 2 Ves. jun. 589.

appointment, neither were nor could be made applicable to the payment either of her debts, her funeral expenses, or her legacies; for the power was not a general but a limited one: *Clogstoun v. Walcott* (c).

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Mr. *Stuart*, Mr. *Walker*, Mr. *Blunt*, Mr. *Craig*, and Mr. *W. R. Ellis*, were the other counsel in the cause.

THE VICE-CHANCELLOR:

I entertain a very clear opinion upon the question in this case; and it appears to me that the decision which I am about to make, is quite consistent with the case of *Clogstoun v. Walcott*.

The state of the property which is the subject of dispute, is this: *Mary Sophia Elliott*, under the will of her father, had an interest in and a power of appointment over so much of two sums of stock standing in the names of the trustees of her father's will, as would, if she had called for a severance, have amounted to 10,263*l.* Bank 3*l.* per Cent. Consolidated Annuities, and 10,833*l.* Bank 3*l.* per Cent. Reduced Annuities; but, at the date of her will, those two sums were respectively embodied in larger sums of like stock.

She commences her will in these words: "I direct all my just debts, funeral and testamentary expenses to be paid by my executors hereinafter named, as soon as conveniently may be after my decease, out of my personal estate." In those words no reference is made to legacies. Then she makes certain specific and pecuniary bequests, and next she says: "I give and bequeath unto my brothers, the Rev. *Henry Venn Elliott* and the Rev. *Edward Bishop Elliott*, three-fourths of one-third

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of the stocks standing in the names of my trustees"—then she names the gentlemen who were the trustees of her father's will—"in the Three per Cent. Consolidated Annuities, and the Three per Cent. Reduced Annuities, in the books of the Governor and Company of the Bank of England." Now, it is not even suggested that there was any other property whatever which could satisfy those words, except that property over which she had disposing power under her father's will, that is to say, the two sums of stock which I have before mentioned. Then she declares the trusts upon which her two brothers were to stand possessed of the share of the sums of stock so given to them. Next, she disposes of the other fourth of one-third of those sums; and, afterwards, she gives to her brother, *Edward Bishop Elliott*, so much of the said Government stocks as would produce the sum of 150*l. per annum*. Now, the two sums over which she had the power, amounted, together, to about 21,000*l.*, one-third of which would amount to 7,000*l.*; and 5,000*l.* would be required to produce 150*l. per annum*. So that she had disposed, in the whole, of about 12,000*l.* stock; and about 9,000*l.* would remain undisposed of. Then she says: "And as to all the rest, residue and remainder of my personal estate and effects whatsoever and wheresoever, after payment of my just debts, funeral and testamentary expenses, and the before-mentioned legacies, I give and bequeath the same unto my brother, the Rev. *Henry Venn Elliott*, and my sister, *Eliza Spragge*, widow, to be equally divided between them, share and share alike."

I never desire to swerve from the rule which, I think ought always to govern a judge, namely, to abide by the words of an instrument, and to give effect, if possible, to every word he finds in it, and to endeavour to mak

them all speak their true meaning. Now, in the commencement of this will, there was no allusion to legacies; but, in the body of it, the testatrix, having given legacies which clearly would be payable out of her own personal estate only, and having, according to my construction, exercised her power of appointment over part of that fund over which she had the power, gives all the rest, residue, and remainder of her personal estate and effects after payment of her just debts, funeral and testamentary expenses, and the before-mentioned legacies. I admit that, if it had been simply a gift of all the residue of her personal estate and effects, it would not have been an exercise of the power; but as the testatrix has added the words: "after payment of the before-mentioned legacies," and as the funds over which she had the power, were alone made applicable to satisfy some of those legacies, I must, of necessity, hold that this residuary clause refers not only to her own personal estate but to the funds over which she had the power; or, in other words, that she meant, by it, to dispose of the residue of her own personal estate after payment of her debts, funeral and testamentary expenses, and of the legacies which she had before given out of her own personal estate, and also to dispose of the residue of the funds subject to her power, after satisfying, out of those funds, the legacies which she had before given out of them by the partial appointments which she had made in the previous part of her will.

And, therefore, I shall declare that the residuary clause was an exercise of the power given to the testatrix by her father's will, and that the parties named in that clause are entitled to so much of the 10,263*l.* Consols and 10,833*l.* Reduced as the testatrix did not dispose of in the preceding part of her will.

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8th & 9th July.

HARVEY v. COLLETT.

*Joint-stock Com-
pany.
Fraud.
Bubble.*

The Defendants projected, *bond fide*, a railway in *Spain*: but, before the Plaintiff purchased shares in it, they knew that it was impracticable.

Held that the Plaintiff was entitled only to the relief which he might have had if the project had been a bubble *ab initio*, namely, to be repaid his purchase-money.

IN October 1844, four of the Defendants having projected the formation of a joint-stock company for purpose of making a railway from *Aviles*, a port on north coast of *Spain*, to *Leon*, in the same country, culated the following prospectus: "The object proposed to be effected by the company, is that of opening communication, by railway, between *Aviles*, passing through the rich mineral districts of the *Asturias*, to *Leon*; while the further extension of the railway *Madrid* will be a subject of future consideration, should the Government accede to the proposed measures of directors and afford the assistance contemplated; *a view to the attainment of which, a member of the board of directors will immediately proceed to Spain.* The importance of a continuation of the line to *Madrid*, will be duly appreciated by those who are conversant with the country and the advantages it must confer on capital as well as intermediate towns, by extending facilities of transit. From *Aviles*, the line traverses the valley of that name, and, at the distance of eight miles reaches the *Ferrones* Collieries; and, four miles farther, crosses the *Santo Firme* coal-field, in which extensive seams of workable coal have been already opened. Thence it continues its route towards *Oviedo*, containing a population of nearly twenty thousand inhabitants, after crossing the *Mieres*, stretches along the banks of the river, proceeding onwards to *Leon*. *The line has been carefully surveyed and reported upon*; the position of *Aviles* having been selected from its fine natural harbour, as affording facilities for carrying on an extensive foreign trade, while the communication with the metropolis of *Spain*, affords no ordinary advantages.

tract of country does not present any considerable difficulties, the gradients being of a favourable nature, while the works can be cheaply and easily executed. The main sources of traffic, exclusive of passengers, which must be considerable, may be thus enumerated; coal, iron, and other mineral produce, limestone, timber, corn, salt, fruit, and general merchandize. The coal-field of the *Asturias*, through which the line passes, has been characterised as the largest, in extent, in the world."—The prospectus then stated the amount of the traffic in coal, iron, &c., which might be expected on the railway; and that it might be fairly calculated to yield a profit of nine percent. at the least. The prospectus next stated the amounts of the deposit and calls on the shares in the company, and the times at which they were to be paid, and that, on payment of the deposit, each subscriber would receive an accountable receipt, to be exchanged for certificates of shares *at the office of the company in London*, and that subscribers in *Spain* would receive a similar receipt, to be exchanged for certificates of shares at the company's offices in *Oviedo* and *Madrid*: that notice of the calls would be given, by advertisement, in the *London* and *Madrid* Gazettes and two or more daily *London* newspapers and in the *Madrid* and *Oviedo* journals: that, when 10*l.* on each share should have been paid, the shareholders would be entitled, on demand, to receive certificates (*cedulas de credito*) which, *in accordance with the 280th Article of the Commercial Code of Spain, were transferable to bearer*: that the constitution of the company was that of an anonymous company *compañia anonima*), *in accordance with the 276th Article of the Commercial Code*: that, by the 278th Article, *the liability of the shareholders was limited to the amount of their respective shares*: that the management of the company would be confided to a board of directors in *London*,

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with power to appoint one or more local directors in *Spain*: that the directors should also have power to enter into such arrangements as they might deem necessary, with the Government and other bodies in *Spain*, in relation to the constitution, statutes, and other terms and conditions for the establishment of the company: and that the meetings of the company would be held, half-yearly, in *London*.

Shortly after the issuing of that prospectus, the same four Defendants circulated another, containing a still more favourable account of the expected traffic on the railway, and estimating the clear profit on the company's capital, at nearly 15 *l.* per cent.

Between the issuing of those two documents, the Defendant *Keily*, one of the directors of the company, went to *Spain* on behalf of the board, and obtained, from the Government of that country, the necessary grants and powers for making the railway. He returned to *England* early in March 1846, and, on the 14th of that month, it was agreed, fraudulently (as the bill alleged), between him and the other directors, that he should be deemed to have obtained those powers and grants for his own benefit and not on behalf of the company, and that the company should purchase them of him for 20,000*l.* On the same day, the directors issued another prospectus, which stated (amongst other things) that the undertaking was patronized by the Queen of *Spain* and several *Spanish* noblemen whom it named; that the powers and grants which had been obtained through *Keily's* exertions, conferred upon the company more valuable privileges and immunities than had been before conferred on any continental railway; that, *by the formation of the company into a compania anonima, the*

liability of the shareholders was limited to the amount of their shares; that the line of the railway had been surveyed and reported upon by competent English surveyors and presented no engineering difficulties; that the country through which it was intended to pass, abounded with coal, iron, corn, &c., and, consequently, that the traffic upon it would be very great; that the affairs of the company would be conducted by the directors in London, assisted by influential directors in Madrid; that the directors had power to enter into such arrangements with the Government and other bodies in Spain, relative to the statutes and other conditions for the establishment of the railway, as they might think proper, and that applications for shares were to be made, in the form subjoined, and addressed to the secretary at the company's offices in Broad-street, London.

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After the issuing of that prospectus, the company's shares were in great demand; and the Plaintiff applied for an allotment of them in the form prescribed by the prospectus of the 14th of March. The directors, however, anticipating that the shares would rise, did not comply with his application, but allotted the greater part of the shares to each other, and afterwards sold them at a considerable premium. The Plaintiff, however, influenced, as he alleged, by the statements and representations contained in the prospectus of the 14th of March, subsequently purchased one hundred of the shares, and received transferable certificates for them.

On the 20th of June 1845, the agreement between *Keily* and the other directors, was carried into effect; but, before that time, the directors had been informed that, owing to the nature of the country through which the railway was intended to pass, and to the engineering

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difficulties which existed, it was impossible to make the railway. They did not, however, communicate that information to the shareholders, until the 19th of December 1845, when a meeting was held, and it then appeared, from the engineer's report, that there were insurmountable difficulties in making the railway, and that the statements and representations contained in the prospectus of the 14th of March, as to the nature of the country through which the railway was to be formed, the probable amount of traffic upon it, and the other circumstances favourable to the project, were wholly or for the most part untrue.

The bill, which was filed by the Plaintiff on behalf of himself and all the other shareholders in or subscribers to the company, against the directors, after stating as above, and that the Defendants had, in their hands, large sums which had been paid, by shareholders in and subscribers to the company, in respect of deposits on their shares, charged that the payment of the 20,000*l.* to *Keily*, was a breach of trust on the part of the Defendants, and a fraud upon the shareholders in and subscribers to the company: that it was untrue, as stated in the prospectus, that the line of the intended railway presented no engineering difficulties; for the engineering difficulties on such line presented an insuperable, or a nearly insuperable obstacle to the formation of the railway; and, on the 14th of March 1845, the Defendants knew that the same were insurmountable and such as rendered the formation of the railway impracticable, and that the fact was that the same was totally impracticable: that the statements and representations made by the Defendants, in the prospectus, of the profit and advantages to be expected from the railway, were put forth by them without their having made any inquiries

into the truth or accuracy of such statements and representations, and without their having obtained any information as to the nature and circumstances of the country through which the railway was intended to pass, and that those statements and representations were calculated and intended, by the Defendants, to mislead and deceive, and did mislead and deceive the Plaintiff and the other shareholders in and subscribers to the company, except the Defendants: that there were upwards of 500 shareholders in the company, and that their rights and liabilities were so subject to change and fluctuation by death or otherwise, that it was not possible, without the greatest inconvenience, to make them parties to the suit, and that, to do so, would make it impossible to prosecute the suit to a hearing; and that the Plaintiff had been unable to discover who were the members of the company, except the Defendants: that all the shareholders had a common interest in having the monies, property and assets of the company duly got in and properly applied to the purposes of the company, and in the relief prayed by the bill.

The bill prayed that the agreement dated the 14th of March 1845, might be declared to be fraudulent and void, and might be cancelled; and that the Defendants and each of them might be decreed to be personally liable to pay and make good, as part of the property, monies and effects of the company, the sum paid, to *Keily*, in performance of that agreement, with interest at *5 l. per cent. per annum* from the day on which the same was paid; and that each of the Defendants might be decreed to account for all sums of money received, by him, as part and out of the property, monies and effects of the company, and also in respect of the shares which had been allotted to and divided amongst them,

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and any premiums, profits or advantages derived therefrom; and that they might account for so much money as, but for their wilful neglect and default, might have been received by them in respect of so many of the shares in the company as were not allotted and disposed of by them; and that an account might be taken of all the monies, property and effects of the company, at any time come to the hands of the Defendants, and that all the sums of money properly paid and expended, by them, on the account and on the behalf of the company, might be ascertained, and that the surplus of the said monies, property and effects so received by the Defendants as aforesaid, after deducting all sums which had been properly paid and expended by them as aforesaid, might be decreed to be paid, by the Defendants, into the bank of the company, to the credit and for the purposes of it; and that the Defendants might be decreed to pay all other the monies and effects of the company, including the sum paid to *Keily*, and interest, into the same bank, to the same credit and for the same purposes; and that all such further directions might be given and accounts and inquiries directed as might be necessary for the purposes before mentioned, and that the Plaintiff and the other shareholders in the company might have such further and other relief, &c.

The Defendants demurred for want of equity and other causes.

Mr. *Walker* and Mr. *Heathfield*, in support of the demurrer, said that the bill asked relief which the Plaintiff would, perhaps, have been entitled to if the company had been a valid one; but the bill stated that the shares were transferable by delivery; that the liability of the shareholders was limited by the amount of their shares,

and that the object for which the company was formed, was impracticable; and, therefore, the whole tendency of the bill was to shew that the company was, in its original constitution, an illegal association and a bubble; and, consequently, that the Plaintiff was not entitled to any relief, or, at all events, not to the relief prayed by the bill (a): *Duvergier v. Fellows* (b); *Blundell v. Winsor* (c); *Harrison v. Heathorn* (d); *The King v. Dodd* (e); *Josephs v. Pebrer* (f); *Ellison v. Bignold* (g); *Kinder v. Taylor* (h); *Ewing v. Osbaldiston* (i); *Jackson v. Cocker* (k).

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Mr. Bethell, Mr. James Parker, and Mr. Welford in support of the bill, said, first, that the cases cited in support of the demurrer were wholly inapplicable to the present; for the company was formed for the purpose of making a railway in *Spain*, and was constituted in conformity to the law of that country, and, therefore, its legality or illegality was to be determined, not by *English*, but by *Spanish* law; that the prospectuses stated that the constitution of the company was that of a *compania anonima*, and that, by certain articles of the commercial code of *Spain*, certificates of shares in a company so constituted were transferable by delivery, and that the liability of the shareholders was limited to the amount of their shares: consequently, the grounds

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| (a) Although the Bubble Act (6 Geo. 1, c. 18) has been repealed by 6 Geo. 4, c. 91, a subscriber to a bubble may recover his money either at law or in equity: see <i>Green v. Barrett</i> , ante, Vol. I., p. 45. | 601. |
| (b) 5 Bing. 248. | (d) 6 Man. & Gr. 81. |
| (c) Ante, Vol. VIII., p. | (e) 9 East, 516. |
| | (f) 3 Barn. & Cress. 639. |
| | (g) 2 Jac. & Walk. 503. |
| | (h) Collyer on Partnerships, Append. 917. |
| | (i) 2 Myl. & Cr. 53. |
| | (k) 4 Beav. 59. |

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on which the counsel in support of the demurrer had contended that the company was an illegal one, entirely failed; secondly, that there was not any foundation for saying that the company was a bubble, for it was formed, *bonâ fide*, for the purpose of making a railway in *Spain*; powers and grants of property were obtained for it from the *Spanish* Government; and shares in it had been allotted to various persons, and deposits paid upon them; and that the undertaking was not known to be impracticable until after the engineers had reported it to be so.

The counsel in support of the bill, added that the relief sought by it, was founded on *Hichens v. Congreve* (l). They referred also to *Harrison v. Heathorn*, *The London and Grand Junction Railway Company v. Freeman* (m); *Garrard v. Hardey* (n); *Walburn v. Ingilby* (o); *Young v. Smith* (p).

The VICE-CHANCELLOR:

This case is reduced to this very short point, whether, on the 14th of March 1845, the scheme proposed by the

(l) 4 Russ. 562.

(m) 2 Man. & Gr. 606:
see 638.

(n) 5 Man. & Gr. 471.

(o) 1 Myl. & Keen, 61:
see 76.

(p) 4 Railway Cases, 135.

In the course of the argument in the above case, the counsel for the bill objected that the office copy of the demurrer stated it to be a demurrer to a bill filed by the

Plaintiff on his own behalf alone, and not on behalf of himself and all the other shareholders in and subscribers to the company, and, therefore, that it was a demurrer to a bill which did not exist. But the *Vice-Chancellor* held, that the Defendants had waived the objection, if there was anything in it, by setting down the demurrer to be argued.

directors, was not, within their knowledge, wholly impracticable. That time is material, because the plaintiff states, in his bill, that he, having been influenced by the statements and representations of the prospectus of the 14th of March 1845, purchased one hundred shares; so that such right as he might have had to interfere in the affairs of the company, came to him after the 14th of March 1845.

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The charge in the bill, is that, on the 14th of March 1845, all the directors well knew that the engineering difficulties in the *Asturias* were insurmountable, and such as to render the formation of such a line of railway as was proposed by the said prospectus, totally impracticable: and the Plaintiff charges that the same was totally impracticable: and there is a similar charge, with respect to the fact of impracticability, in a preceding part of the bill, where it states that, from the said report, it appears, as the fact is, that the said intended railway is altogether impracticable. And then the bill charges that the statements and representations of the prospectus are, wholly or for the most part, untrue, so that there is a most positive allegation not only that the undertaking is impracticable, but that it was known so to be, by the directors, before the Plaintiff became a purchaser of shares.

I admit that there is a great deal of allegation, incidentally, as to the law of *Spain*. For instance, there is a statement that, by a particular article in the *Spanish* code of commercial law, shares in a company constituted as this is alleged to be, are transferable by delivery; and that, by another article of the same code, a limited responsibility only is sustained by shareholders in a company so constituted. But though it appears that

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there have been grants and concessions made by the Royal authority, or the authority of the Government of *Spain*, and that the Queen of *Spain* has condescended to be the patron of this undertaking, and a great number of dukes and counts also have become patrons of it; yet I do not find that there is any allegation that the projection of a scheme known to be impracticable, is a scheme that would be considered, by the law of *Spain*, other than as it would be considered by the law of *England*. And it seems to me that, upon the allegations in this bill, I must take it that the directors, at the time when they issued the prospectus of the 14th of March 1845, confiding in which the Plaintiff purchased his shares, knew that the project was totally impracticable. That is the averment upon the bill. Then, if the Plaintiff so states the case, he really states that these Defendants were projecting a manifest fraud, a mere bubble, a mere scheme to cheat; and, as he states his case in that way, I am of opinion that I am not at liberty to give him the detailed relief which he asks by his bill. And it rather seems to me that, having aimed, substantially, at the relief which he does ask, I am not at liberty now to say that all the relief he has asked and the whole of his prayer, is to go for nothing, and that his bill is to be considered, merely, as a bill for the purpose of recovering, from the Defendants, the amount of what he may have paid for his shares, or the original value of them. My opinion, therefore, is that this demurrer must be allowed on the grounds which I have stated. And that makes it unnecessary for me to enter into the various other questions that have been mooted at the bar.

If, indeed, the project had not appeared to be a fraud in the knowledge of the directors at the time when they

issued the prospectus (which was before the Plaintiff's purchase), then the principle of *Hichens v. Congreve* would have applied. But the Plaintiff, for the purpose of overwhelming the directors with charges of fraud, has gone rather too far to enable me to give him any relief at all, and, consequently, the demurrer must be allowed.

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GILBERT v. COOPER.

MOTION, on behalf of *W. R. Drake*, the solicitor for the Plaintiff, that *W. B. James*, the solicitor for some of the Defendants, might be directed to pay, to *Drake*, 172*L.*, the amount of the Plaintiff's bill of costs in the cause, pursuant to *James's* undertaking dated the 9th of July 1846.

1848:
8th March.
Jurisdiction.
Solicitor.
Agreement.

Performance of an agreement to compromise a suit, entered into by the solicitor for the Plaintiff and the solicitor for the Defendant, by which the latter agreed to pay the Plaintiff's costs to the former, enforced by order made in a summary way.

The notice of motion was intituled in the cause and also in the matter of *W. B. James*, one of the solicitors of the Court. The affidavit in support of it, stated that *Drake* and his partners were the solicitors of the Plaintiff, and that *James* was the solicitor for some of the Defendants; that, in July 1846, a compromise of the suit was arranged between *Drake* and *James*; and that the following memorandum of it was made in writing, and intituled in the cause: "Memorandum of agreement made this 9th day of July 1846, between Mr. *W. R. Drake* as the solicitor for and on behalf of the above-named Plaintiff, and Mr. *W. B. James* the solicitor for the above-named Defendants: It is hereby agreed as follows: First, that the order for an injunction made in the above-mentioned cause, restraining the Defendants

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James Leonard, Morse Cooper, and Henry Tootal, from prosecuting the order obtained by them, on or about the 17th day of June, in: '*Ex parte* an undertaking for making a railway from *Ludgershall* to *Poole*,' for payment out of court of the sum of 55,000*l.* cash in the Plaintiff's bill mentioned, be dissolved on the motion of the Defendants, and that the Plaintiff shall appear on such motion and consent. Secondly, that an application shall be made, at the earliest convenient opportunity, by the Plaintiff, to be consented to by the Defendants, for leave to amend the bill by striking out the name of Mr. *Gilbert* as Plaintiff, and inserting the name of some shareholder as Plaintiff, to be nominated by Mr. *James*. Thirdly, that the costs of the suit, and all costs, charges and expenses properly incurred in relation thereto or to this agreement, as between solicitor and client, *shall be paid to Mr. Drake by Mr. James*. Mr. *Drake*, forthwith, to deliver his bill; and, if any question should arise thereupon, the same to be referred to Mr. *John Gregory*. Fourthly, that Mr. *James* shall pay to Mr. *Gilbert*, within one week after the sum of 55,000*l.* shall be received from the Accountant-General, the sum of one pound ten shillings per share on the shares mentioned in the bill, to be held by him on Mr. *Gilbert*'s delivering up the scrip of such shares to be cancelled. Fifthly, that Mr. *James* shall indemnify Mr. *Gilbert* against all costs which may be claimed against him, in the said suit, by any of the other Defendants thereto, besides those for whom Mr. *James* has appeared as solicitor."

The affidavit further stated that, on the 13th of October 1846, *Drake* delivered to *James* the Plaintiff's bill of costs in the suit, amounting to 172*l.*; that *James* had made no objection thereto, but had not paid the

same pursuant to his undertaking, although repeated applications had been made to him; that *Drake*, in entering into the arrangement, always intended to have *James's personal* responsibility for payment of his costs, and not that of his clients, who were personally unknown to him, and that, without such personal responsibility on the part of *James*, he would not have concluded the arrangement; and that *that* was well known to and understood and assented to by *James*, as appeared by the undertaking, which expressly provided that the costs should be paid by *James* himself and not by his clients; that, throughout the negotiation and in entering into the agreement, *James* acted in his capacity of a solicitor.

On the hearing of the motion, the questions were, first, whether the costs were agreed to be paid by *James* personally, or, as his counsel contended, by his clients? and, secondly, if they were to be paid by him personally, whether the Court had any jurisdiction to order him, summarily, to pay them?

The *Vice-Chancellor* said that it was manifest, from the terms of the agreement in general and from the fifth clause of it in particular, that it was meant to be a personal undertaking by the parties to it; and, as it was an agreement, not between parties with whom the Court had nothing to do, but between the solicitors in the cause, who were officers of the Court, the Court ought to enforce performance of it in a summary way.

Order made with costs.

Mr. *Bethell* and Mr. *Wickins* moved.

Mr. *Rolt* and Mr. *Bethell* opposed. They cited *Peart v. Bushell* (a).

(a) *Ante*, Vol. II., p. 38.

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1846:

14th July.

Solicitor and
Client.

A lady resident in *Ireland* agreed with an *Irish* solicitor, that if he would employ a solicitor in *London* to take out for her certain letters of administration in *England*, which were necessary to complete her title to a fund in the Court of Chancery in *England*, and afterwards procure the fund for her, he should receive a commission of 10*l. per cent.* upon the amount of the fund, and also be reimbursed what he should pay to the *London* solicitor.

Held that the agreement was contrary to policy, and therefore could not be enforced.

STRANGE AND RIVERS v. BRENNAN.

UNDER a decree made in 1807, 2000*l.* Three per Cents. were transferred into the Accountant-General's name, to answer the growing payments of an annuity given, by *Thomas Gaul*, the testator in the cause, to *Mary Whitehead*: and, by the decree, certain persons were declared entitled to the clear residue of the testator's estate, and any person or persons entitled to the 2000*l.* stock, were to be at liberty to apply to the Court on *Mary Whitehead's* death. She died in 1841 the residuary legatees died several years before her. The Defendant, *Margaret Brennan*, who resided at *Waterford* in *Ireland*, was their next of kin; and, being entitled, as such, to the 2000*l.* stock, she applied to several solicitors in *Waterford* to employ a solicitor in *London* to procure, for her, letters of administration to the residuary legatees and a transfer of the stock. But they declined to undertake the business on account of there being some difficulty in establishing her right to such letters of administration, and of the expense which must necessarily be incurred in taking them out. At length, however, she prevailed on the Plaintiff, *Thomas Fitzgerald Strange*, who was a solicitor in *Ireland* but not in *England*, to undertake the business on the following terms, to which she cheerfully acceded, namely that he should receive, for his trouble, a commission of 10*l. per cent.* on the sum to be recovered, and be reimbursed what he should pay, out of his own pocket, to the solicitor in *London*. *Strange* obtained the necessary evidence of the Defendant's right to the letters of administration, and, at her request, consented to become one of the sureties for her, and prevailed on the other

Plaintiff, *Joseph Michael Rivers*, to become the other surety in the administration-bonds; and she agreed to indemnify them in the manner after mentioned. In October 1845, she signed the following memorandum of the agreement between her and the Plaintiffs:

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"Memorandum of agreement between *Margaret Brennan*, spinster, of the one part, and *Thomas Fitzgerald Strange*, gentleman, attorney, and *Joseph Michael Rivers, Esq.*, of the other part: whereas it has become necessary that the said *Margaret Brennan*, in order to establish her claim, as administratrix, to certain monies in the Bank of England contingent on the death of *Mary Whitehead*, should take out three several administrations in the Prerogative Court of *Canterbury in England*, and also prove her claim with the said three wills* and as such administratrix, under the further and other will of *Thomas Gaul, of Sawbridgeworth*, who died on or about the month of March 1801, and which said will has been the subject of a Chancery suit; and it has also become necessary, for the said *Margaret Brennan*, under the said several administrations, to find sureties to enter into bonds on behalf of her, the said *Margaret Brennan*, to the amount of 18,000 l. for the due performance, by her, of the duties named therein; and she, being unable to find or procure the same, hath requested the said *Thomas Fitzgerald Strange* to find and procure them for her; and, in order to protect the said sureties from any loss or damage they might sustain by reason of the said bonds and from their having signed the same, she, the said *Margaret Brennan*, hath consented and agreed to permit the said *Thomas Fitzgerald Strange* and *Joseph Michael Rivers* to retain and keep, of the said funds*, should the same happen to be recovered, and for the space of six years, a sum

* Sic.

* Sic.

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 * *Sic.*

sufficient to bear harmless and keep indemnified the said sureties from any action at law or other responsibilities which they might incur as aforesaid, the said sum to be so retained by the said *Thomas Fitzgerald Strange, Joseph Michael Rivers* and *Margaret Brennan* *, as trustees for the said *Margaret Brennan* * and whomsoever else and whatsoever person the same may be fairly and legally applicable to ; and, inasmuch as the said *Thomas Fitzgerald Strange* has incurred much expense and professional labour in the management of the said administrations, and has been obliged to advance and lay out, on behalf of the said *Margaret Brennan*, all the monies requisite for the same, the said *Margaret Brennan* has undertaken and agreed to pay to the said *Thomas Fitzgerald Strange*, as a bonus or consideration (commission, *qu?*), and exclusive of the law costs, the sum of 10*l.* per cent. on such sum or sums of money as may actually be recovered and realized out of the said fund as aforesaid ; and she further agrees and undertakes, for herself, her executors, administrators and assigns, and all persons claiming or deriving under them, to carry out this agreement in perfect good faith, and to do all act or acts that may be necessary for carrying the same into effect. Dated at *Waterford* this day of October 1845."

In November following, the Defendant, and the Plaintiffs as her sureties, executed the administration bonds, and the several letters of administration were granted to her ; and, shortly afterwards, the stock was transferred to her by *Strange*'s procurement, but on the understanding that the agreement was to be carried into execution ; she, however, refused to perform it : whereupon the bill was filed. After stating as above, it alleged that the Defendant intended to sell out the stock

and convert the produce to her own use, without applying any part to the payment of the debts of the persons whom she represented; that, if she did so, the Plaintiffs, as her sureties, would be liable, under the bonds, to make good the deficiency arising from such application; that, in consequence of the risk incurred, by *Strange*, by reason of the Defendant being unable to provide the funds necessary for establishing and perfecting her title to the stock, or to repay any part of the expenses in case her claim had failed, and also in consequence of the great trouble and difficulty which he had to encounter in collecting evidence of her title, the agreement was a fair and reasonable one; that, *as he was a solicitor in Ireland only and not a solicitor of the Court of Chancery*, and was, consequently, obliged to employ a solicitor in *London* to conduct the said business on behalf of the Defendant, the employment of him by her must be considered as *in the character of a general agent*; that, if his claim to the commission of 10 *l.* per cent. should not be allowed, he was entitled to a lien on the fund for his costs, charges and expenses incurred in the business, and for a reasonable remuneration for his trouble therein.

The bill prayed that the agreement might be declared to be valid and binding, and might be specifically performed; and that the 2000 *l.* stock or a competent part thereof, might be secured for the purpose of indemnifying the Plaintiffs against the risk incurred by them as such sureties as aforesaid; and that, if the Court should not be of opinion that the Plaintiff, *Strange*, was entitled to the aforesaid commission or per centage of 10 *l.* per cent., then that he might be declared to have a lien on the stock, for the payment of his costs, charges and expenses, and of a suitable remuneration for his trouble in the matters aforesaid; or that the Defendant might be

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decreed to pay the same; and that, in the meantime she might be restrained from selling and transferring the stock, or any part thereof.

The Defendant demurred, to the bill, for want of equity and other causes.

Mr. *Bethell* and Mr. *Bird*, in support of the demurrer for want of equity, contended that the agreement was void as amounting to either champerty or maintenance and also as being contrary to policy.

Mr. *James Parker* and Mr. *R. W. Kennion*, in support of the bill, said that it alleged that the Defendant had agreed to indemnify the Plaintiffs, out of the stock in respect of their having executed the administration bonds as her sureties, and that she threatened and intended to sell out the stock and to misapply the proceeds; that every surety who had stipulated that the principal should indemnify him out of a particular fund might, if the principal was going to deal with the fund file a bill to have it secured, and, therefore, there was sufficient equity, in the first part of the agreement, to support the bill: secondly, that the fund was not in litigation, and, therefore, there was no champerty or maintenance in contracting with respect to it: thirdly, that *Strange* was the Defendant's *agent*, not her solicitor and that it was very common and perfectly justifiable for an agent employed, in a foreign country, to recover the fund in this country, to receive a commission; but, if he was to be considered as the Defendant's solicitor, he was entitled to a lien, on the fund, for his costs*, and

* *Strange* had no lien on the fund except under the agreement; for the costs in respect of which he was alleged to have a lien, were not incurred in the suit in which the fund was realized.

whether that lien would or would not exceed 10*l. per cent.* on the fund, would depend on the amount of his costs when taxed.

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The VICE-CHANCELLOR:

I shall allow this demurrer.

It is true that *Strange* does not appear to have been an *English* solicitor; but he was a solicitor in *Ireland*; and the case is much the same as if the fund had been in *Ireland* and the Defendant had consulted an *English* solicitor as to the means of obtaining it, and he had stipulated that another solicitor should be employed to do the business, and that he, himself, should have 10*l. per cent.* upon the fund. It would be dangerous to say that there is any difference between that case and the case of a solicitor agreeing to do the business himself, and stipulating that he should have 10*l. per cent.* on the fund.

My opinion is that the policy of the law is as much opposed to this case, as it would have been if *Strange* himself had been the solicitor employed to do the business.

Besides, the agreement is so constructed that it cannot be carried into effect; for it provides, first, that the fund, or at least a portion of it, shall be retained by the Plaintiffs alone, and, afterwards, that it shall be retained by the Plaintiffs and the Defendant: how can such an agreement be performed*?

* The order allowing the demurrer was affirmed, by Lord Cottenham, C., on the 30th July 1846.

1848:

12th January.

*Jurisdiction.**Injunction.*

Order made in a summary way, to restrain a person, not a party to the suit, to whom the Receiver had let a farm, part of the estates in the cause, from removing hay, straw, &c., therefrom.

WALTON v. JOHNSON*.

IN this cause a decree had been made, and a Receiver of the rents of the real estates in the cause had been appointed, with the usual directions to let the estate with the approbation of the *Master*.

The Receiver, with the approbation of the *Master*, let a farm, part of the estates, to *John Farndale*, as tenant from year to year, and *Farndale* agreed to cultivate it in a husbandlike manner.

On the 7th of September 1847, the Receiver, under the direction of the *Master*, gave *Farndale* notice to quit the farm in March 1848, and on the 12th of November 1847, the *Master* allowed a proposal to let the farm, in March, to another tenant.

Mr. *E. F. Smith* now moved, on behalf of the Plaintiffs in the cause, for a special injunction to restrain *Farndale* from carrying away from the farm any hay, straw, turnips, green fodder, or manure until the further order of the Court.

It appeared from affidavits in support of the motion, that it was contrary to the custom of the country for a tenant from year to year, to remove any of those articles, and that *Farndale* was removing hay and straw.

Onslow v. — (a) was cited in support of the motion and it was submitted, that, though the tenant was not a party to the cause, and no bill had been filed against him, the Court had jurisdiction to grant the injunction.

* *Ex relatione.*

(a) 16 Ves. 173.

The VICE-CHANCELLOR:

The tenant having entered into an agreement with the Court itself, by means of the Receiver, I do not think it necessary that a bill should be filed against him. Take an order for an injunction in the terms of the motion (b).

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(b) See *Attorney-General* ens, 68 ; *Casamajor v. Strobe*,
v. Duke of Ancaster, 1 Dick- 1 Sim. & Stu. 381.

NELSON v. CALLOW.

1848 :

17th March.

Power of Sale.
Perpetuity.

SAMUEL ROWLAND, by his will dated the 29th of January 1845, devised all his freehold estates, except such as should be vested in him as a trustee or mortgagee, unto and to the use of the Plaintiffs and their heirs, in trust for his wife for life, and, after her decease, in trust to raise certain sums of money by sale or mortgage of a sufficient part of the estates, and, subject thereto, in trust for *Samuel*, the eldest son of his brother *Peter Rowland*, and his heirs; and if *Samuel* should die under twenty-one, and without leaving issue living at his decease, then in trust for *Peter's* other sons successively, according to their seniorities, and their respective heirs; but so that the estate and interest of each and every of them should die under that age and without leaving issue living at their deaths, in trust for the person who should then be his heir, absolutely. And he empowered the trustees of his will for the time being to sell the estates at any time after his decease and at their sole discretion.

Held that the power of sale was valid.

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them who should die under twenty-one and without leaving issue living at his decease, should, immediately on his death, cease and determine in favour of his next brother and his heirs; to the intent that the trust-estates should be taken and enjoyed by each of the sons in succession, according to his seniority, in case his elder brother should die under twenty-one and without leaving issue living at his decease; and so that the estate and interest of any such son who should attain twenty-one or should die under that age leaving issue living at his decease, might become absolutely vested in him, his heirs and assigns. The testator next declared similar trusts in favour of the first and other daughters of *Peter Rowland* in succession, and their heirs, in case no son of *Peter* should attain twenty-one or die under that age leaving issue living at his death; and directed that, on the failure of all the preceding trusts, the trustees should hold his estates in trust for the person or persons who should then be his heir or co-heirs at law, absolutely. And he empowered the trustees of his will for the time being, at any time after his decease in their sole discretion, to sell all or any part of his estates and to lay out the proceeds in the purchase of other estates, and to cause the purchased estates to be settled upon the same trusts and subject to the same powers (including the power of sale) as were declared by his will, of the devised estates.

After the testator's death, the trustees agreed to sell part of the estates to the Defendant: but he declined to complete the contract, because he had been advised "that the power of sale was void as contravening the rule against perpetuities, such power being unrestricted and requiring no consent by the beneficial owners." On the other hand, the trustees were advised: "that t

power was good (the limitations of the trusts not transgressing the rule against perpetuities), and that it might be exercised at any time before the determination of the limitations which preceded the ultimate one."

1848.

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CALLOW.

Under those circumstances the bill was filed for a specific performance of the contract.

Mr. *Bethell* appeared for the Plaintiffs, and

Mr. *Stuart* and Mr. *Bazalgette* for the Defendant.

The question, however, was not argued, the counsel on both sides being of opinion that the objection to the power of sale could not be sustained : and

The *Vice-Chancellor*, being of the same opinion, declared the power to be valid, and decreed a specific performance of the agreement (a).

(a) See *Wallis v. Freestone*, ante, Vol. X., p. 225 ; *Biddle v. Perkins*, ante, Vol. IV., p. 135 ; *Powis v. Capron*, Ib. 138, note ; *Waring v. Coventry*, 1 Myl. & Keen, 249 ; *Boyce v. Hanning*, 2 Crom. & Jerv. 334 ; and *Wood v. White*, 4 Myl. & Cr. 460.

DRUCE v. DENISON.

1847:
16th June;
and
1848:
3rd March.

Practice.

*Transfer of
stock in Court.
Representation.
Fund in Court.*

Stock in Court
ordered to be
transferred to a
person claiming
it under letters
of administra-
tion granted
not by the Pre-
rogative Court
of Canterbury,
but by the Con-
sistory Court of
London.

SAMUEL DENISON, the testator in this cause, bequeathed a moiety of his residuary estate in trust for his wife for life, and died in 1796, leaving the reversion expectant on his wife's death, undisposed of.

Under the decree in the cause (a), a large sum of consols was transferred into the Accountant-General's name to the account of the testator's widow and next of kin; and the dividends of it were directed to be paid to the widow for her life, with liberty to the parties interested in the capital, to apply on her death. She died in 1846. Upon which *Mary Ann Hoyle* became entitled to a share of the fund, in the following manner: *Juliana Hamerton* was one of the testator's next of kin, and was found to be so by the *Master's* report made in pursuance of the decree in the cause. She died in 1807, leaving her husband, *James Hamerton*, her surviving. He did not administer to his wife; but died in 1811, having bequeathed his property to *Thomas Hoyle* and *Elizabeth Hoyle*, as joint tenants, and having appointed *Thomas Hoyle* his executor. *Thomas Hoyle* proved his will in the Consistory Court of the Bishop of London and died, intestate, in 1816. *Elizabeth Hoyle* died intestate in 1840, and *Mary Ann Hoyle*, who was her sole residuary legatee and executrix, proved her will in the same Court, and, afterwards, obtained administration to *Thomas Hoyle*, and administration *de bonis non* to *James Hamerton*, with his will annexed, and, finally administration to *Juliana Hamerton*, all from the same

(a) See a report of the hearing in 6 Ves. 385.

Court. She then petitioned to have the share of the fund in Court, to which *Juliana Hamerton* was originally entitled in reversion expectant on the decease of the testator's widow, transferred to her.

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Mr. *Shapter*, in support of the petition, said that *Mary Ann Hoyle* had endeavoured but was unable to prove the will of *James Hamerton* in the Prerogative Court of the Archbishop of *Canterbury*, because the Consistory Court had refused to part with the original, and the Prerogative Court would not grant probate of a copy; and he contended that, though the letters of administration taken out by the petitioner, had been obtained from the Consistory Court, they were sufficient to entitle her to have the share of the fund which she claimed, transferred to her. He cited *Scarth v. The Bishop of London* (b); 1 *Williams* on Executors, 3rd edit., 228, note; *Smith v. Stafford* (c), and *Ex parte Horne* (d): and added that there was no case which decided that a *London* probate or administration was insufficient to entitle a party to have stock in court transferred to him, although there were cases in which probates and administrations granted by other inferior jurisdictions, had been held to be insufficient; such as *Docker v. Horner* (e), *Sweet v. Partridge* (f), *Challnor v. Murhall* (g), *Newman v. Hodgson* (h), and *Thomas v. Davies* (i).

The VICE-CHANCELLOR declined to make the order, on the ground that it was the practice of the Court not to

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| (b) 1 Haggard's Eccles. Ca. 625 and 636. | Bro. C. C. 240. |
| (c) 2 Wilson's Ch. Rep. 166. | (f) 5 Ves. 148. |
| (d) 7 Barn. & Cres. 632. | (g) 6 Ves. 118. |
| (e) 2 Dick. 746; S. C., 3 | (h) 7 Ves. 409. |
| | (i) 12 Ves. 417. |

CASES IN CHANCERY.

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order stock to be transferred to the personal representative of a testator or intestate, unless he had been invested with that character by the Prerogative Court. His Honor, however, recommended Mr. *Shapter* to mention the case to the *Lord Chancellor*.

His Lordship, on the case being brought before him, said that he would confer with the Judge of the Ecclesiastical Court upon it: and, on the 3rd of March 1848, Mr. *Colvile*, the Registrar, communicated to Mr. *Shapter*, that his Lordship had directed the Accountant-General to act upon the *London* administrations, and to transfer, to the petitioner, the share of the fund which she claimed.

1846:
6th July.

Practice.
Amendment.
Affidavit.
New Orders.

The affidavit required by the 67th Order of May 1845, on a special application to amend an information, must be made by the solicitor to the relators.

THE ATTORNEY-GENERAL at the Relation of
R. GODSON and Another v. WAKEMAN.

MR. *ANDERDON* made a special application for leave to amend the information. The application was supported by an affidavit to the effect required by the 67th General Order of May 1845, but, there being no Plaintiff in the suit, it was made by the solicitor to the relators (a).

Mr. *Bethell* contended that, under the 3 & 4 Will. 4, c. 94, sects. 13 & 14, the application ought to have been made to the *Master* in the first instance: and

The VICE-CHANCELLOR so ruled, and also that the affidavit was properly made by the solicitor.

(a) See the 67th and 69th Orders, *Beavan's Ord.* and 309.

GILES v. HOMES.

BY the settlement on the marriage of *Francis Bennett Derry* with *Jane Hules*, dated in December 1807, a messuage, farm, and lands were settled on them for their lives successively, with remainder to their first and other sons, successively, in tail, with remainder to their daughters as tenants in common, but without any words of limitation, with remainder to the right heirs of *F. B. Derry*. There was issue of the marriage two daughters.

In 1835, *Ann Isabel*, the younger daughter, married *Thomas Jones*. By the settlement on their marriage, dated the 2nd of April 1835, and reciting the settlement of 1807, *Ann Isabel* and her father conveyed the reversion in fee in one moiety of the messuage, farm, and lands, expectant on the determination of the estates tail, unto and to the use of *J. F. Giles* and *William Lewis* and their heirs, in trust for the separate use of *Ann Isabel*, during the joint lives of her and her intended husband, with remainder in trust for the survivor of them for life, with remainder in trust for their children or issue as they, or the survivor of them, should appoint, with remainder in trust for such of their sons as should attain twenty-one, and such of their daughters as should attain that age or marry, and their heirs; and the settlement directed the trustees, after the decease of the survivor of *Ann Isabel* and her intended husband, to apply the rents of each child's presumptive share of the trust-premises, for its maintenance and education until

1846:
14th July.

Construction.
Settlement.
Power of Sale.

A reversion of a moiety of a farm was settled on a marriage, and the trustees were empowered to sell it when in possession; and the intended husband and wife covenanted that, if they should thereafter acquire any other share or interest in the farm, they would, immediately thereupon, convey the same so that it might become vested in the trustees upon the trusts and subject to the powers declared of the settled moiety. After that moiety had fallen into possession, a moiety of the

other moiety descended to the wife, not in possession but subject to a life interest.

Held, nevertheless, that it, as well as the settled moiety, were saleable under the power.

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its share should vest; and to accumulate the surplus. The settlement then contained the following clauses, which were set forth, *verbatim*, in the bill :

Provided always, that it shall be lawful for the trustees and trustee for the time being of these presents, at any time or times *after the said trust-premises shall have fallen into possession* or been received as aforesaid, by the direction in writing of the said *Thomas Jones* and *Ann Isabel Derry*, or the survivor of them, during their respective lives, and, after the decease of such survivor, by and of their and his proper authority, but without prejudice to any such direction or appointment as aforesaid, by mortgage, sale, or otherwise, of or out of the respective share of any child of the said intended marriage in the said trust-premises, to levy and raise any sum or sums of money not exceeding, in the whole, one-half part of the value of his or her respective apparent or expectant share, and to apply the monies so to be raised, for the benefit and advancement in the world of such child, notwithstanding his and her share in the said several trust-premises, shall not be then vested or shall not then have fallen into possession: Provided always that in case there shall be no child of the said *Ann Isabel Derry* by the said *Thomas Jones*, or, being any such child or children, in case no such child, being a son shall live to attain the age of twenty-one years, or, being a daughter, shall live to attain that age, or be previously married, then the said trust-premises, or so much and such part or parts thereof respectively as shall not have been applied or otherwise disposed of as aforesaid, shall after the decease of the survivor of them the said *Thomas Jones* and *Ann Isabel Derry*, and also after such failure of issue (if any), be held and remain upon the trusts following (that is to say), if the said *Ann Isabel Derry* shall survive the said *Thomas Jones*, in trust for

the said *Ann Isabel Derry*, her heirs and assigns; but, if the said *Ann Isabel Derry* shall depart this life in the lifetime of the said *Thomas Jones*, then, as to the said reversion or remainder moiety and hereditaments, hereby settled, in trust for *Emma Derry*, the sister of the said *Ann Isabel Derry*, her heirs and assigns for ever; but, in case the said *Emma Derry* shall depart this life in the lifetime of the said *Ann Isabel Derry*, or shall afterwards depart this life without leaving issue behind her, then upon trust for the said *Francis Bennett Derry*, his heirs and assigns for ever: provided also, and it is hereby further agreed and declared, by and between the said parties to these presents, that, in case the said *Ann Isabel Derry* shall depart this life in the lifetime of the said *Thomas Jones*, without leaving issue behind her, or, in case of her leaving such issue the same shall depart this life, then and in such case and upon payment unto the said *Thomas Jones* of the sum of 1000*l.* by the person or persons who, for the time being, shall be entitled to the said moiety, hereditaments, and premises, the life-estate hereinbefore limited* to the said *Thomas Jones* in case he survive the said *Ann Isabel Derry*† as aforesaid, and all other interest he may have or obtain under these presents or the hereinbefore recited settlement, shall cease and be void: provided also, and it is hereby declared and agreed that it shall be lawful for the said *J. F. Giles* and *William Lewis*, and the survivor of them, and the heirs of such survivor and their and his assigns, with the consent in writing of the said *Thomas Jones* and *Ann Isabel Derry* and the survivor of them during their respective lives, and, after the decease of such survivor, of their or his own proper authority during the minority or respective minorities of any child or children of the said intended marriage, by indenture or indentures under their or his hands and seals or hand and seal, to demise

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* *Sic.*

† *Sic.*

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• *Sic.*

or lease *the said reversion* or remainder*, moiety, and hereditaments, or any part or parts thereof, to any person or persons whomsoever, for any term or number of years not exceeding twenty-one years *in possession* and in reversion*, and for the best yearly rent that can be reasonably gotten for the same, without taking any fine or premium, and so that none of the lessees be made punishable for waste, and so that, in every such lease, there be contained a condition for re-entry for non-payment of the rents thereby reserved for the space of twenty-one days after the same shall become due, and so that the lessees do execute counterparts thereof respectively: Provided always, and it is hereby declared and agreed that it shall be lawful for the said *J. F. Giles* and *William Lewis*, and the survivor of them, and the heirs of such survivor and their heirs and assigns, *at any time or times after the said reversion or remainder hereinbefore granted shall have fallen into possession*, and with the consent in writing of the said *Thomas Jones* and *Ann Isabel Derry* or the survivor of them, *to make sale* and absolutely dispose of, for such price or prices in money as to them or him shall seem reasonable, or by way of exchange for or in lieu of other freehold or copyhold messuages, lands, or hereditaments in *England* or *Wales*, so as such copyhold hereditaments (if any) be held for an estate of inheritance in fee and at a fine certain and subject only to small conventional payments or quit rents, all or any part of the said moiety and hereditaments hereby settled; and also, at any time or times after the said intended marriage and whether the said reversion or remainder hereby settled shall, for the time being, *have fallen into possession or not*, but with such consent as aforesaid, or, during the minority or respective minorities of any child or children of the said intended marriage, of their or his own proper authority, to make or

join in making a partition of the said messuage, farm, lands, and hereditaments hereinbefore mentioned and described, or any of them, and to give and receive any money for the equality of any such exchange or partition as aforesaid; and to sign and give proper receipts for the money for which the same moiety and hereditaments shall be sold, or to be received for the equality of any such exchange or partition as aforesaid, and such receipts shall discharge the person or persons paying the same from such purchase or other monies, and from being answerable or accountable for the loss, misapplication, or non-application thereof; and, when all or any parts of the said moiety and hereditaments hereby settled, shall be sold for a valuable consideration in money, and such receipt shall be signed and given for such purchase-money as aforesaid, and, also, when all or any part of the same moiety and hereditaments shall be disposed of or conveyed in exchange or for effectuating any partition as aforesaid, the said moiety and hereditaments, or such part thereof as shall be so sold or conveyed, shall be, for ever thenceforth, freed and discharged of and from all and every the trusts, powers, provisoes, declarations, and agreements in and by these presents expressed and declared of and concerning the same, save and except the subsisting lease and leases (if any) which shall have been previously granted under the power lastly hereinbefore contained; and that the money to arise by such sale or sales as aforesaid or to be received for the equality of any such exchange or partition as aforesaid, shall, with such consent as aforesaid or at the proper discretion of the said trustees or trustee for the time being, according to circumstances, be laid out in the purchase of other freehold or copyhold messuages, lands, and hereditaments in *England or Wales*,
so as such copyhold hereditaments (if any) be held in

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fee and at a fine certain and subject only to such conventional payments or quit rents, *and that the hereditaments and premises so to be purchased*, as also the said hereditaments and premises so to be received or taken in exchange or upon any such partition as hereinbefore is mentioned, shall, with all convenient speed, be conveyed so as to be vested in the trustees or trustee for the time being of these presents, upon such of the trusts and with and under and subject to such of the powers, provisoes, declarations, and agreements hereinbefore expressed and contained of and concerning the said moiety and hereditaments hereby settled, as may be then subsisting and capable of taking effect; and that, until proper purchase or proper purchases can be found upon which to lay out the said monies, the trustees or trustee for the time being of these presents, do and shall, with the consent in writing of the said *Thomas Jones and Ann Isabel Derry*, or the survivor of them, and, after the decease of such survivor, of their or his own proper authority, lay out and invest the same monies in their or his names or name, in the parliamentary stocks or fund of *Great Britain*, or at interest upon government or real security in *England* or *Wales*, to be from time to time altered or varied with such consent as aforesaid, as the said trustee or trustees for the time being, shall, in their or his discretion, think fit; and do and shall pay the interest, dividends, and annual proceeds of the said monies, stocks, funds, and securities to the person or persons who, under the trusts hereinbefore declared, would for the time being be entitled to the rents of the said hereditaments so to be purchased in case the same were actually purchased and settled conformably to the trusts and directions hereinbefore contained: Provided always, and it is hereby declared and agreed that the receipt or receipts in writing of the trustee or trustees for the time

being for any money, stocks, or funds payable or transferable or applicable by them or him under or by virtue of these presents, shall be an effectual discharge, to all intents and purposes whatsoever, for the monies, stocks, and funds therein expressed or acknowledged to be received. And this indenture further witnesseth that, in consideration of the said intended marriage, and pursuant to the agreement of the said parties, in the behalf following, made upon the treaty for the same, he, the said *Thomas Jones* and also the said *Ann Isabel Derry* severally and respectively, for themselves and their respective heirs, executors, and administrators, do hereby covenant and promise to and with the said *J. F. Giles* and *William Lewis*, their heirs, executors, administrators and assigns, that, if the said *Ann Isabel Derry*, or the said *Thomas Jones* in her right, shall, at any time or times during the said intended coverture, by gift, devise, transmission, or otherwise, become entitled to any other share or interest or shares or interests in the said messuage, farm, lands and hereditaments hereinbefore mentioned and described, then and in such case that they, the said *Thomas Jones* and *Ann Isabel Derry* and each of them, will immediately thereupon and from time to time, at the costs of the said property, convey, settle and assure all and every such share or interest so as that the same may become vested in the trustees or trustee for the time being of these presents, upon and for such of the trusts, intents and purposes, *and with, under and subject to such and so many of the powers, provisoes, declarations and agreements hereinbefore mentioned*, expressed, declared and contained of and concerning the said several trust-premises hereby respectively granted and assured and hereinbefore settled or intended so to be, as shall be then subsisting or capable of taking effect.

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Francis Bennett Derry survived his wife and died intestate, in August 1843, leaving his daughters, *Emma* and *Ann Isabel*, his co-heirs; so that *Ann Isabel* became seised in fee, in reversion expectant on the decease of her sister, *Emma*, of a moiety of that moiety of the messuage, farm and lands, of which *Emma* was tenant for life under the settlement of December 1807.

In March 1846, *Ann Isabel* and her husband, in performance of the covenant for that purpose contained in the settlement of April 1835, conveyed their moiety of that moiety to the trustees of the settlement of April 1835; to hold the same to them and their heirs, *from and after the determination of Emma's life estate therein* upon and for such and the same trusts, intents and purposes, *and with, under and subject to such and the same powers*, provisos, declarations and agreements, as were expressed and contained, in the settlement of April 1835 of the moiety thereby settled, or such of them as were then subsisting and capable of taking effect: and, shortly afterwards, the trustees, in exercise of the power of sale contained in the last-mentioned settlement, agreed, with the consent of *Thomas Jones* and *Ann Isabel* his wife to sell, to the Defendant, the moiety of the messuage farm and lands thereby settled, and also the reversion of a moiety of the other moiety conveyed to them in March 1846.

Afterwards the trustees filed a bill, against the Defendant, for a specific performance of the contract: to which the Defendant demurred, because it appeared, by the bill, that the trustees were not authorized, by the power of sale contained in the settlement of April 1835, to sell the moiety of the moiety during the continuance of *Emma's* life-estate therein.

Mr. *Whitmarsh*, jun., appeared in support of the demurrer, and

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Mr. *Bird*, in support of the bill: but, the Defendant being a willing purchaser, they did not argue the question, but merely submitted it to the consideration of the Court.

The VICE-CHANCELLOR:

The words of the covenant on which the question has arisen, are: "that, if *Ann Isabel Derry* or *Thomas Jones* in her right, shall, at any time or times during the intended coverture, by gift, devise, transmission or otherwise, become entitled to any other share or interest in the said messuage, farm, lands and hereditaments, then they will, immediately thereupon, convey, settle and assure all and every such share or interest, so as that the same may become vested in the trustees or trustee for the time being of these presents, upon and for such of the trusts, intents and purposes, and with, under and subject to such and so many of the powers, provisoes, declarations and agreements hereinbefore mentioned, expressed, declared and contained of and concerning the said several trust-premises hereby respectively granted and assured and hereinbefore settled or intended so to be, as shall be then subsisting and capable of taking effect." So that, as soon as *Mrs. Jones* became entitled to the interest in reversion or remainder expectant on her sister's death, in a moiety of a moiety of the farm, she and her husband were bound to convey it so that it might become subject, immediately and not when it should become an interest in possession, to the trusts and powers of the settlement. With respect to the settled moiety, the settlement provides that the power of sale shall not be exercised until that moiety shall

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have fallen into possession; but that suspension of the power does not apply to the moiety of the other moiety.

Declare that the power of sale may now be exercised with respect to the moiety of the farm and lands in the pleadings mentioned which is comprised in the settlement of the 2nd of April 1835, and with respect also to the moiety of the other moiety thereof which descended to *Ann Isabel Jones*, on the death of her father, subject to her sister's life-interest therein under the settlement of the 18th of December 1807: and, with that declaration, overrule the demurrer, but without costs.

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15th July.

"Or" construed
"and."
Will.

Construction.

Testator gave all his property to his mother for life, and directed that, at her decease, it should be divided amongst his three sisters or their children,

in such proportions as she should appoint. The mother and one of the sisters died in the testator's lifetime. The deceased sister left no issue; but one of those that survived, had children. Held that "or" must be read "and;" and that, under the circumstances of the case, the property must be considered as given to the three sisters and their children in equal shares.

PENNY v. TURNER.

TAVER PENNY made his will, dated the 5th of April 1792, and in the following words: "I give and devise unto my mother, *Mary Penny*, for her natural life, all estate, real and personal, that I may be in possession of at the time of my decease or be entitled to in reversion, as also all other property whatsoever; and, at the decease of my said mother, I do will and devise that all the said estates and property shall be divided amongst my three sisters, *Jane Stevens*, *Elizabeth Turner* and *Harriet Penny*, or their children, in such proportions as she, my said mother, shall appoint by

her last will and testament, or by any deed in writing made by her in her lifetime."

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The testator's mother died in 1806. *Jane Stevens*, one of his sisters, died, in 1834, without issue. The testator died in November 1841. His sisters *Harriet Penny* and *Elizabeth Turner* were his only next of kin. The former was a single woman: the latter was a widow and had two children living at the testator's death, namely, *Eliza Turner* and *Maria*, the wife of *Samuel Turnley*.

The bill was filed by *Harriet Penny* against *Elizabeth Turner* (who was the administratrix of the testator's effects with his will annexed) and her two children. It alleged that, according to the true construction of the will, the testator's property was divisible into three parts; one whereof was vested in the Plaintiff, another in the Defendant *Elizabeth Turner*, and that the other lapsed* by the death of *Jane Stevens* in the testator's lifetime, and was divisible between the Plaintiff and *Elizabeth Turner* as the testator's co-heirs and next of kin; but that the Defendants alleged that, according to the true construction of the will, the testator's estate and effects were divisible into five parts, one whereof was vested in the Plaintiff, and another in each of the Defendants, and that the remaining fifth had lapsed and was divisible between the Plaintiff and the Defendant *Elizabeth Turner*. The bill prayed that the rights and interests of the parties in the testator's *personal estate*, might be ascertained and declared.

* Sic.

Mr. *Bethell* and Mr. *J. V. Prior* for the Plaintiff, said that, if the testator's mother, as well as his sisters, had survived him, the mother must have appointed his

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property amongst his sisters, but in such shares as she might think proper; and that, if his sisters had died in his lifetime leaving children, she must have appointed the property amongst their children in like manner; or, in other words, that the power was not a power of selection, but was merely a power to determine the shares of the property which the sisters, if they survived the testator, or, their children, if they did not, were to take; and that, the power having become incapable of being exercised by the death of the donee in the testator's lifetime, the will must be construed as if it had given the property, directly, to the sisters or their children; in which case the children would be considered to be merely substituted for their parents in case their parents should die in the lifetime of the testator; and that, as two of the sisters had survived the testator, and the other had left no child, each of the two survivors took one-third of the testator's personal estate, under his will, and one-half of the remaining third as his next of kin: *Jones v. Torin* (a), *Montagu v. Nucella* (b), *Crooke v. De Vandes* (c), *Salisbury v. Petty* (d).

Sir F. Simpkinson, Mr. James Parker, Mr. Hislop Clarke, and Mr. Parsons for the Defendants, contended that the word "or," ought to be construed "and;" and that the intention of the testator was that his sisters and their children who should be living at his death, should take his property, but that his mother should determine the proportions in which they were to take it; and that, she having died in his lifetime, the Plaintiff and the three Defendants were entitled to one-fifth each of the property under the will; and that the remaining fifth having

(a) *Ante*, Vol. VI., p. 255.

(b) 1 Russ. 165.

(c) 9 Ves. 197.

(d) 3 Hare, 86.

become undisposed of in consequence of *Jane Stevens* having died in the testator's lifetime, the Plaintiff and the Defendant *Elizabeth Turner* were entitled to it as his next of kin: *Longmore v. Broom* (e), *Kennedy v. Kingston* (f), *Burrough v. Philcox* (g), *Walsh v. Wallinger* (h), *Eccard v. Brooke* (i), *Richardson v. Spraag* (k), and *Horridge v. Ferguson* (l).

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The VICE-CHANCELLOR:

I do not think that *Jones v. Torin* has any application to this case. There, it could not be determined who *the descendants* would be until the death of the children; and it might have been held that the gift to them was void: at all events it was clearly substitutory.

Here, the property being given amongst the testator's sisters or their children as his mother should appoint, it is given to a class of persons who might have been appointees; therefore, the word "or," must, of necessity, mean "and:" so that the mother would have had power to appoint the property amongst the sisters of the testator and their children: and I am of opinion that those persons who constituted the class amongst whom the mother might have exercised her power of selection, are the persons to take; that is, that, under the circumstances of this case, the will must be taken as giving the property to the three sisters named in it and to their children; and, as one of those sisters died before the testator, and one of the survivors has no children, and

(e) 7 Ves. 124.

(i) 2 Cox, 213.

(f) 2 Jac. & Walk. 431.

(k) 1 P. W. 434.

(g) 5 Myl. & Cr. 73.

(l) Jac. 583.

(h) 2 Russ. & Myl. 78.

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the other has only two, I shall declare that the surviving sisters and the children take a fifth of the property each, and that the remaining fifth goes, as undivided, of, to the surviving sisters, as the testator's next of kin.

1846:
 16th July.

Answer.
Debt.
Sufficiency.

If a Defendant submits to answer a bill that is not demurrable, he must answer it fully, notwithstanding he denies the Plaintiff's title and sets up an adverse one in himself.

DOTT v. HOYES.

THE Plaintiffs sued, on behalf of themselves and other next of kin of an intestate, for the administration and distribution of the intestate's effects, and required the Defendant, who had obtained letters of administration to the intestate, as being, himself, the next of kin to set forth the usual accounts of the intestate's effects. The Defendant put in an answer, in which he denied the title of the Plaintiffs, and stated that he was the sole next of kin, and how he made out the truth of his statement: and, under those circumstances, he refused to set forth the required accounts.

The *Master* having reported that the answer was sufficient, the Plaintiffs excepted to the report.

Mr. *Cole*, in support of the exceptions, said that the bill was not demurrable, and, therefore, the case was not within the 38th Order of August 1841 (a), and as the Defendant had not pleaded that the Plaintiffs were not next of kin to the intestate, but had submitted to answer, he was bound to answer fully, and, consequently, that he ought to have set forth the accounts.

(a) See Beavan's Orders, 175.

Mr. *James Parker* and Mr. *Bagshawe*, in support of the report, contended that, as the Defendant had denied the Plaintiffs' title and set up an adverse title in himself, and as that title had been recognised by the Ecclesiastical Court, he was not compellable to set forth the accounts: Mit. on Plead. 311, 4th edit. (b). They added that the Court would not decree the Defendant to account, until it had ascertained who the next of kin were; and that the Plaintiffs ought to have applied, to the Ecclesiastical Court, to recall the letters of administration.

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v.
HOYES.

THE VICE-CHANCELLOR :

I entertain so clear and settled an opinion upon the point, that I shall allow the exceptions at once, and, if the Defendant is dissatisfied with my decision, he may appeal to the *Lord Chancellor* or to the House of Lords.

On referring to my notes, I find that, in 1839, I made a similar decision in *Strickland v. Strickland* *.

(b) "Where a Defendant sets up a title in himself apparently good, and which the Plaintiff must remove to found his own title, the Defendant is not bound, generally, to make any discovery not material to the trial of the title."

* See the next case.

1846:

16th July.

New Orders.

Answer.

Defendant.

Though a Defendant submits to answer a bill to the whole of which he might have demurred, he is at liberty to protect himself, under the 38th General Order of August 1841, from answering any of the interrogatories which he may think proper to decline to answer.

MASON v. WAKEMAN.

A DEMURRER to the whole bill in this cause might have been sustained. The Defendant, however, put in an answer, in which he answered some of the interrogatories, but declined to answer others, insisting that the bill was demurrable, and, therefore, he was at liberty to decline to answer them, under the 38th General Order of August 1841 (a). The Plaintiff excepted the answer, on the ground that the Defendant, having submitted to answer, was bound to answer fully; and the Master allowed the exceptions. The Defendant took exceptions to the Master's report.

On the hearing of them,

The Vice-Chancellor, after having considered the conflicting decisions of Vice-Chancellor *Knight Bruce* and Vice-Chancellor *Wigram* on the 38th Order, and after having conferred with those learned Judges on the subject, held that, according to the true construction of that Order, the Defendant, though he had submitted to answer the bill, was at liberty to protect himself, under it, from answering any of the interrogatories which he might think proper to decline to answer; and, therefore, that the exceptions to the report must be allowed.

Mr. *Stuart* and Mr. *F. Bayley*, in support of the exceptions, cited the decisions of Vice-Chancellor *Wigram* in *Tipping v. Clarke* (b), *Drake v. Drake* (c), and *Fairthorne v. Weston* (d).

(a) See Beavan's Orders, *et seq.*

175.

(c) Ibid. 647.

(b) 2 Hare, 383. See 392

(d) 3 Hare, 387.

G. W. Collins, in support of the report, cited the
ns of Vice-Chancellor *Knight Bruce* in *Moles-*
r. Howard(e), and *Baddeley v. Curwen* (f).

(e) 2 Coll. 145.

(f) Ibid. 151.

1846.

MASON
v.

WAKEMAN.

FIELD v. EVANS.

1846:

17th July.

marriage settlement, the trustees were directed,
the life of the lady, from time to time, to receive
the rents, issues, and profits, and annual income
settled property, *when and as often as the same*
become due, and to pay the same to her or to such
or persons as she should, from time to time, di-
d appoint, or, otherwise, to permit and suffer her
ive and take the same for her own sole use and
, separate and apart from her then intended or
ture husband, and so and in such manner that the
night not be under his control, or subject or liable
disposition, debts, contracts, forfeitures, or engage-
and so and in such manner that the receipt or
s of the lady alone, or of any person or persons to
she might appoint the same rents, issues, profits,
come respectively, *after the same should become*
ould be a valid discharge, in law, to the person or
s paying the same, for so much money as, in such
: or receipts respectively, should be acknowledged

Feme covert.
Anticipation.
Separate Pro-
perty.
Settlement.
Construction.

A marriage
settlement di-
rected the trus-
tees, during the
lady's life, to
receive the in-
come of the
settled pro-
perty, when and
as often as the
same should
become due,
and to pay it to
such person or
persons as she
might, from
time to time,
appoint, or to
permit her to
receive it for

her separate use; and it declared that her receipts, or the re-
ceipts of any person or persons to whom she might appoint the
same *after it should become due*, should be valid discharges for it.

Held that the lady was restrained from anticipating the income
provided for her.

1846.

FIELD
v.
EVANS.

or expressed to have been received, and should release the same person or persons respectively from the obligation of seeing to the application thereof, and from all liability by reason of the misapplication or non-application thereof or of any part thereof.

The question was whether that clause was sufficient to restrain the lady from anticipating her income under the settlement.

The *Vice-Chancellor* decided in the affirmative.

Mr. *Cooper* and Mr. *Bilton* were the counsel in the cause.

1846:
18th July.

Municipal Corporation.

Under the Municipal Corporation Reform Act, the corporation of a city ought to be styled: The Mayor, Aldermen, and Citizens of the City.

THE CORPORATION OF ROCHESTER v. LEES

THE Plaintiffs were styled, in the bill: "The Mayor, Aldermen, and Burgesses of the city of *Rochester*, in the county of *Kent*." The *Vice-Chancellor* granted a motion to amend the bill, by adding the words: "Otherwise called the Mayor, Aldermen, and Citizens of the city of *Rochester*, in the county of *Kent*;" because, under the Municipal Corporation Reform Act, the proper denomination of the corporation of a city was: "The Mayor, Aldermen, and Citizens" of the city (a).

(a) See *The Attorney-General v. Corporation of Worcester*, 2 Phill. 3. In that case the corporation were described, in the information and in the title to their answer, as the Mayor, Aldermen, and Burgesses of the

city of *Worcester*. The *Lord Chancellor* allowed the title to the answer to be amended by adding the words: "In the information by mistake called the Mayor, Aldermen, and Burgesses of the said City."

MANN v. STEPHENS.

IN 1838, *T. Smith*, being seised in fee of a piece of land near *Gravesend* in *Kent*, on which he had built three houses, sold and conveyed one of the houses to *J. T. Scott*, and covenanted, for himself, his heirs and assigns, with *Scott*, his heirs and assigns, that an adjoining piece of land, of which also he was seised in fee, should, for ever thereafter, remain and be used as a shrubbery or garden, and that no house or other building should be erected on any part of it, except a private house or ornamental cottage, and *that* only on a certain part of it called *The Dell*, and so as to be an ornament, rather than otherwise, to the surrounding property. In October 1845, the house, after several mesne conveyances, became vested in the Plaintiff in fee. In 1843, *T. Smith* sold and conveyed the piece of land, to which the covenant related, to *H. W. Smith* in fee; and *H. W. Smith* entered into a covenant with *T. Smith*, similar to that which *T. Smith* had entered into with *Scott*. *H. W. Smith*, afterwards, sold the piece of land to *F. Chinrock*; of whom the Defendant purchased it in November 1845; and, in January following *H. W. Smith* conveyed it to him. The Defendant, at the time of his purchase, had actual notice of the covenant entered into by *H. W. Smith* with *T. Smith*, and constructive notice of the original covenant: but, nevertheless, he began to build a beer-shop and brewery on part of the land, not in *The Dell*. Whereupon the bill was filed for an injunction

1846:
23rd & 28th
July.

Covenant.
Injunction.
Notice.

A. being seised in fee of a house and a piece of open land near to it, sold and conveyed the house to *B.*, and covenanted, for himself, his heirs, and assigns, with *B.*, his heirs and assigns, that no building whatever should, at any time thereafter, be erected on the piece of land. He afterwards sold and conveyed the piece of land to *M.* in fee, and took a covenant from him in the terms of that which he himself had entered into with *B.* The house, after divers mesne conveyances, became vested

in *X.* in fee; and the piece of land, after one mesne conveyance, became vested in *Y.* in fee. *Y.*, before the land was conveyed to him, had notice of the covenant; but, notwithstanding, he began to build upon the land. The Court, at the suit of *X.*, restrained him from continuing the building.

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v.

STEPHENS.

to restrain him from proceeding with those buildings, and from erecting any other building on the land, except a private house or ornamental cottage to be erected in *The Dell*, and so as to be an ornament, rather than otherwise, to the surrounding property.

Mr. *Bethell* and Mr. *J. T. Humphry* now moved for the injunction, on the ground that the Defendant purchased the piece of land with notice of the covenant. They referred to *The Duke of Bedford v. The Trustees of the British Museum* (a), *Whatman v. Gibson* (b), and *Rankin v. Huskisson* (c).

Mr. *Stuart* and Mr. *Mee Mathew*, contra, said that there was no privity between the Plaintiff and the Defendant; and that the burden of the covenant did not run with the land. They cited *Spencer's case* (d), *Hemingway v. Fernandes* (e), and *Keppell v. Bailey* (f).

Mr. *Bethell*, in reply, said that he did not ask for the injunction upon a legal, but upon an equitable ground, namely, that the Defendant purchased the piece of land with notice of the covenant.

The *Vice-Chancellor* was clearly of opinion that the erecting of the beer-shop and brewery was a gross violation of the covenant. And, accordingly, he granted an injunction to restrain the Defendant from erecting, on the piece of land, any brewery or other building except one private house or ornamental cottage, to be

(a) 2 Myl. & Keen, 552.

(d) 5 Rep. 31 b.

(b) *Ante*, Vol. IX., page 196.(e) *Ante*, Vol. XIII., page 228.(c) *Ante*, Vol. IV., page 13.

(f) 2 Myl. & Keen, 517.

erected in *The Dell*, and so as to be an ornament, rather than otherwise, to the surrounding property.

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v.

STEPHENS.

The Plaintiff, afterwards, obtained an order for the commitment of the Defendant, on the ground that he had committed a breach of the injunction. The Defendant appealed, to the *Lord Chancellor*, from that order, and also from the order for the injunction.

His Lordship considered that the injunction was properly granted, but directed the order for it to be varied, by omitting the words: "and which shall be ornamental, rather than otherwise, to the surrounding property," as being too indefinite. His Lordship directed also that the order for the commitment of the Defendant should be discharged; because the evidence of the breach of the injunction was not sufficient to justify it; and that the motion should stand over* with liberty, to the Plaintiff, to bring an action on the covenant.

**Sic.*

1846:

28th July.

*Defendant.**Production of documents.**Staying proceedings in a suit.*

Lord P., having conveyed his estates to trustees in trust to raise money for payment of his debts, and, subject thereto, in trust for himself, a suit was instituted, by one of his creditors, against

him and his other creditors, to have the trusts of the deed carried into execution. After the Defendants had answered the bill, and the deeds relating to the estates had been deposited in the *Master's* office, Lord P. died, having devised the estates to his nephew; who, after he had been made a Defendant to a supplemental bill, entered into a treaty, with an insurance company, for a loan to enable him to pay off the debts due to the Plaintiff and the other parties to the suit; and, after giving them notice of his intention to pay them off, he moved that all further proceedings in the suit might be stayed, and that he and his solicitors, and the solicitors and agents of the insurance company, might be at liberty to examine the abstracts of title to the estates, with the deeds in the *Master's* office, and to take copies thereof, for the purpose of verifying the title to the estates and effecting the loan; and that, for the same purpose, the Plaintiff and two of the Defendants might be ordered to produce, to him, and his solicitors, and to the solicitors and agents of the insurance company, all deeds, &c. in their custody relating to the estates.—Motion refused.

DAMER v. THE EARL OF PORTARLINGTON.

THIS was a suit for the performance of the trusts of a deed, by which the Earl of *Portarlington* conveyed his estates to trustees in trust to raise 344,000 *l.* to pay off debts due to the Plaintiff and several other persons, all of whom were Defendants, and, subject thereto, in trust for himself, his heirs and assigns. The Earl died after he and the other Defendants had answered the bill; and his nephew, the present Earl, having become interested in the estates under his will, the Plaintiff filed a bill of revivor and supplement against him. Shortly afterwards, the Earl being desirous of putting an end to the suit, which, on account of the numerous parties to it, was a most expensive one, entered into a treaty with an insurance company, for a loan to a sufficient amount to enable him to pay off the sums due to

the Plaintiff and the other parties to the original suit; and, after he had given them notice of his intention to pay them off, he served them with notice of a motion that all further proceedings in the suit might be stayed until further order, and that he and his solicitors and agents and the solicitors and agents of the insurance company, might be at liberty to examine the abstracts of the title to the late Earl's estates, with the deeds relating thereto (which had been deposited in the *Master's* office under an order in the original suit), and to take copies thereof and extracts therefrom, with a view to verifying the title to the estates and effecting the intended loan; and that the *Master* might deliver out, to the Earl, his solicitors or agents, any maps, plans, rentals, &c. in his office, relating to the estates, which might be required for making and completing the valuation of the estates for the purpose of the loan, upon such terms and subject to such restriction as the *Master* should direct; and that, for the same purpose, the Plaintiff and two of the Defendants, and also the Receiver in the cause, might be ordered to produce, to the Earl, his solicitors or agents and to the solicitors, agents and surveyors or valuers of the insurance company, all deeds, maps, &c. in their respective custody or power, in any way relating to the estates, at all reasonable times and upon reasonable notice being given to them to produce the same.

Mr. *Stuart*, Mr. *James Parker*, and Mr. *Follett*, appeared in support of the motion.

Mr. *Bethell* and Mr. *Roundell Palmer* opposed it for the Plaintiff.

Mr. *Cooper*, Mr. *Koe*, Mr. *Lovat*, Mr. *Bagshawe*, Mr.

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PORTARLINGTON.

Toller, Mr. Glasse, Mr. Maxwell, and Mr. Gardner appeared for other parties.

The VICE-CHANCELOR:

My opinion is that I have no jurisdiction whatever to do what is asked by this motion.

It is not a motion which proposes, with money in hand, instantly to pay off all those who are incumbrancers; but it is a proposal that, through the medium of the interference of the Court, a speculation may be carried on, about which the insurance company is to exercise its own judgment, and what judgment it will exercise it is not easy to foresee. But the Court is required, first of all, to go out of its way, in order that this speculation may be indulged in by those who are not in the least bound by any order of the Court, on the question whether they will advance the money or not.

It is a very singular thing that this mode of proceeding should be resorted to at all; because, if the present Lord *Portarlington* and all the incumbrancers on the late Lord's estates except the Plaintiff, Col. *Damer*, were really desirous to have the money raised, and the insurance company were desirous to lend it, how easy would it be, without the interference of the Court, to let the insurance company become the assignee of all the incumbrances, with the consent of the present Lord *Portarlington*. But that is not the course proposed. It is proposed that the Court shall interfere in a manner in which, I apprehend, it has no jurisdiction to interfere, in order to assist the present Lord to obtain a loan of money from a company, whilst it remains a matter of

deliberation and doubt, with the company, whether they will lend the money or not.

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The cases in which this Court has ordered the proceedings in a cause to be stayed, are cases in which the Defendant has come with his money in his hand and offered to pay the Plaintiff the full amount of his demand and the costs of the suit. But this notice of motion asks that all further proceedings in the cause may be stayed, not finally, but until the further order of the Court, and that the Defendant, Lord *Portarlington*, his solicitors and agents, and also the solicitors and agents of the insurance company (who are not parties), may be at liberty to examine the abstracts of the title to the estates, with such of the title deeds, writings and documents relating thereto as are now deposited in the office of the *Master*, and to take copies of them and so on; and, in short, to have the benefit of all the documents in the possession of the Court; and that the Plaintiff and the Defendants, *Palmer* and *Nettleship*, and also *Sadler*, the Receiver, may, for the purpose of effecting and completing such loan as aforesaid, be ordered to produce and shew, to the Defendant, Lord *Portarlington*, his solicitors or agents, and to the solicitors, agents, surveyors, or valuers of the insurance company, all deeds, leases, papers, writings, and documents in their custody relating to the estates and so on. Did any one ever hear, except in that very extraordinary case of the *Princess of Wales v. Lord Liverpool* (a), (which I have always regarded as a merely political decision), of a Defendant asking that the Plaintiff shall produce his deeds?

(a) 1 Swans. 114.

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THE EARL OF
PORTARLINGTON.
TON.

If a cross-bill is filed and the Plaintiff in the original cause, being the Defendant in the cross-cause, admits certain documents to be in his possession, an order for their production may be made in some cases; but not in a case like the present, where the Plaintiff stands in the situation of a mortgagee.

I have great respect for the motives which induced Lord *Portarlington* to make this application; and I think it a very laudable thing that he should be desirous to pay off the incumbrances and preserve the family estates; but I cannot violate the known rules of this Court, in order to enable a party to attain any object, however praiseworthy it may be.

Motion refused with costs (*b*).

(*b*) See 2 Phill. 30.

1846.

5th Nov.

Public policy.
Restraint of
marriage.

GRACE v. WEBB.

A. covenanted
with B., a single
woman by
whom he had

two children, to pay her, for her life, subject to the proviso thereafter contained, an annuity of 40*l.*: provided that if she should, at any time thereafter, happen to marry with any person, then the annuity should be reduced to 20*l.*

Held that the proviso was void as being in restraint of marriage.

BY an indenture dated the 1st of May 1802, and made between *John Webb*, the testator in the cause, of the one part, and *Elizabeth Castle*, spinster, of the other part, after reciting that *Elizabeth Castle* had been delivered of two children, namely, *Charles* and *Henry*, of whom *John Webb* did admit and acknowledge himself

the father; and that he had proposed and agreed to provide for and maintain the said children, and also to make some provision and settlement for and upon *Elizabeth Castle* in manner thereafter expressed; he, in pursuance of such proposal and agreement and in consideration of 10*s.* paid by *Elizabeth Castle*, covenanted, for himself, his heirs, executors and administrators, with *Elizabeth Castle*, that he, his executors and administrators, would pay or cause to be paid, to her, for her life, *subject to the proviso thereafter contained*, an annuity or clear yearly sum of 40*l.*, payable quarterly, on Midsummer and the three other days therein mentioned, the first payment thereof to commence on Midsummer-day then next, provided that, in case *Elizabeth Castle* should, at any time thereafter, *happen to marry with any person or persons whomsoever, then, from and immediately after her marriage, the said annuity or yearly sum of 40*l.* should be and was, thereby, reduced to 20*l.* only*, which said sum of 20*l.* was, in such case, to be paid and payable to her, from the time of her marriage, for the remainder of her life by equal quarterly payments on the days before appointed for payment of the annuity of 40*l.*; the first quarterly payment of the annuity of 20*l.* to be made on such of the said quarter-days as should happen next after her marriage.

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Elizabeth Castle remained single for more than three years after the date of the deed. She then married *Richard Elborough*. The testator paid her the annuity of 40*l.* until her marriage; but, from the time of her marriage down to the time of his death, he paid her no more than 20*l.* a year. By his will, which was dated several years after the marriage, he ratified and confirmed the annuity-deed in these terms: "I, hereby, ratify and confirm a certain indenture made and executed by me

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bearing date on or about the 1st day of May, 1802, between myself of the one part and *Elizabeth Elborough*, then *Elizabeth Castle*, spinster, of the other part."

Mr. and Mrs. *Elborough*, having obtained the leave of the Court, went in before *Master Dowdeswell*, to whom the cause mentioned in the title to this case, was referred, and claimed to be paid the annuity of 40 *l.* and the arrears thereof, out of the testator's estate. The *Master*, however, after hearing counsel in support of and in opposition to the claim, disallowed it, on the following grounds: "I am of opinion that the proviso in the deed of the 1st of May 1802, cannot be considered as a general restraint of marriage: and I am of opinion that the will of the testator executed after the marriage of Mrs. *Elborough*, did not give, to Mrs. *Elborough*, any interest in the annuity in question, that was not given to her by the deed. Whether the proviso in the deed is to be deemed a proviso in general restraint of marriage, must be determined by the intention of the parties. Had it been so intended by the settlor, I think he would have directed that the whole of the annuity should cease on the marriage of *Elizabeth Castle*; and would not have contented himself with directing that, on that event taking place, the annuity should be reduced from 40 *l.* to 20 *l. per annum*. The proviso does not appear to be an unreasonable one: a man may be anxious to provide for an unmarried woman: he may assume that, on her marriage, she would be otherwise provided for; and he may direct that, on her marriage, the provision so made for her, should revert to him or his executors. A limitation or bequest to an unmarried woman until her marriage and then over, would be good: and I think that the provision for *Elizabeth Castle*, of an annuity of 40 *l.*, with a direction that it should be reduced to one of 20 *l.* in the

Event of her marriage, must be considered as a gift to her of 40*l. per annum* until her marriage, and of 20*l. per annum* after that event. The principle stated by *Godolphin* and referred to by Lord *Thurlow*, in *Scott v. Tyler (a)*, and by Sir *James Wigram* in *Morley v. Renoldson*, appears to apply to this case, viz., that the use of a thing may be given, during celibacy, for all purposes of intermediate maintenance, and will not be interpreted, maliciously, to a charge of restraining marriage."

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WEBB.

Mr. *Bethell* and Mr. *Winstanley*, in support of a petition presented, by Mr. and Mrs. *Elborough*, for leave to except to the *Master's* report, said that the proviso in the annuity-deed was an attempt to restrain the annuitant from marrying, generally, and, therefore, it was void as being contrary to public policy, and, consequently, the *Master* had miscarried in not allowing the petitioners to prove for the arrears of the annuity of 40*l.* They cited *Rishton v. Cobb (b)*, and *Morley v. Renoldson (c)*.

Mr. *Montagu*, for the Plaintiff, whose interest it was to support the *Master's* report, said that the annuity-deed did not contain any condition in restraint of marriage, but the effect of it was to secure an annuity of 40*l.* to Mrs. *Elborough* until her marriage, and an annuity of 20*l.* after her marriage, and, therefore, its validity was wholly unimpeachable.

Mr. *Stuart*, Mr. *Bacon*, Mr. *G. L. Russell* Mr. *Hoff-*

(a) 2 Dick, 722; S. C., 2 Bro. C. C. 431. See 488. (b) *Ante*, Vol. IX., p. 615. (c) 2 Hare, 570.

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v.

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man and Mr. *Denison* appeared for other parties, but did not take any part in the argument.

The VICE-CHANCELLOR :

It is most beneficial to a state to have a multitude of subjects ; and, therefore, restraints on marriage are objectionable as being against public policy. A man may make a provision for his wife, and declare that it shall cease on her second marriage ; because it is considered that a husband has a sort of interest to preserve the viduity of his wife, for the sake of his children. But the grantor of the annuity in the present case, could not have had any motive whatever for inserting the proviso in the deed, except that the larger annuity might operate as an inducement to *Elizabeth Castle* not to marry. Therefore, my opinion is that the finding of the Master is wrong.

WARD v. ARCH.

1846 :

6th Nov.

Conversion.

EBENEZER WHITING, by his will, dated the 4th of August 1795, after making specific and pecuniary bequests to his wife, *Elizabeth Whiting*, and other persons, gave and bequeathed all the rest, residue and remainder of his estate and effects whatsoever and wheresoever, as well real as personal, or of what nature, kind or quality soever the same might be at the time of his decease, from and after payment of all his just debts, and his funeral and testamentary expenses, unto *Henry Tickell, Humphrey Donaldson* and *John Woods*, their heirs, executors, administrators and assigns, upon trust that they or the survivors or survivor of them, his heirs, executors, or administrators, should, as soon after his decease as conveniently might be, call in and settle all and every account and accounts between him and every person or persons whatsoever, and, in case there should not be sufficient to pay and satisfy the

Testator gave all his estate and effects of what nature, kind or quality soever, after payment of his debts, funeral and testamentary expenses, to trustees, their heirs, executors, &c., in trust, in case there should not be sufficient to pay the annuity thereinafter given to his wife, to sell all

his real and personal estate and invest the proceeds in the funds, and out of the dividends, or the rents of his real estate until the same should be sold, to pay his wife an annuity of 300*l.*, and after paying an annuity to another person, to pay the residue of the rents and dividends to his wife for her life: and he gave all the rest of his estate and effects, after payment of his debts, legacies, and funeral and testamentary expenses, and the before-mentioned annuities, to his four sisters, to be equally divided between them share and share alike; but, if any of them should die, before their shares should become due and payable, leaving a child or children, then he gave the share of such of them so dying, unto such child or children.

The testator left no residuary personal estate; and the rents of his real estate were not nearly sufficient to pay his wife's annuity. But nevertheless the real estate remained unsold long after her death.

Held that, under the circumstances, it was to be considered as converted into personalty by the will.

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annuity of 300*l.* *per annum* thereafter given to his wife, then upon trust *to sell and dispose of all and every part of his real and personal estates*, and lay out and invest the money arising by such sale or sales, in the purchase of government or other good securities; and, by and out of the interest, dividends or proceeds thereof, or the rents of his real estates until the same should be sold, to pay, unto his wife and her assigns during her life, one annuity or yearly sum of 300*l.*, on the feast day of St. *John* the Baptist and the birth of our Lord *Christ* in every year, the first payment thereof to be made on such of the said feast days as should happen next after his decease, and also from and after the payment thereof, upon trust, by and out of the said interest, dividends and proceeds, to pay unto the Plaintiff, *Frances Ann Ward*, during her life one annuity or yearly sum of 20*l.*, on the feast day aforesaid, by even and equal portions, the first payment thereof to begin and be made on such of the said feast days as should happen next after his decease; and upon further trust that his trustees, or the survivors or survivor of them, his heirs, executors or administrators should pay and apply all the rest, residue and remainder of the *rents*, interest and dividends and proceeds, unto his wife and her assigns during her life; and, from and immediately after her decease, then upon further trust that his trustees, or the survivors or survivor of them, his heirs, executors or administrators, should pay unto *Frances Ann Ward*, one further annuity or yearly sum of 30*l.*, and to be paid and payable to her at the same time as the annuity of the 20*l.* was thereinbefore directed to be paid to her, and the first payment thereof to be made on the first of the said feast days that should happen after the decease of his wife; and the testator gave, devised and bequeathed all the rest, residue and remainder of his

estate and effects whatsoever and wheresoever, from and after payment of all his just debts, legacies, funeral and testamentary expenses and annuities as aforesaid, unto his four sisters, *Mary Phillips, Judith Bellamy, Dorothy Tickell and Christiana Whiting*, to be equally divided between them, share and share alike: provided that if either of them should depart this life before *their share should become due and payable*, leaving any child or children her or them surviving, then he gave and bequeathed the part and share of such of them so dying, unto such child or children, to be equally divided between them share and share alike, and, in case of no such child, then he gave and bequeathed the part or parts of her or them so dying, unto and amongst the survivors or survivor of his said sisters: provided always and he did thereby declare that, in case the amount of the rents, issues, dividends and proceeds of his real and personal estate, should not be sufficient to pay and satisfy the annuity of 300*l.* by him thereinbefore given to his wife, then and in such case, he did thereby revoke the several legacies by him thereinbefore bequeathed, and did thereby authorize and empower his trustees, or the survivors or survivor of them, by and out of his real and personal estate, to purchase an annuity of 300*l. per annum*, or so much thereof as they should want to make up the annuity, to his wife, of 300*l.* during her life: and the will contained clauses enabling the trustees to give effectual discharges for the purchase-money on the sale of the estates, and for the indemnity of the trustees.

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The testator died in September 1795, leaving his wife and the other persons named in his will, surviving.

There was not any clear residue of the testator's per-

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sonal estate; and the rents of his real estate did not exceed 100*l.* a year, and, consequently, they were not nearly sufficient to pay the annuity of 300*l.* given to his wife. No part, however, of the estate was sold during her lifetime. But, several years after her death, (which took place in March 1804), a part was sold to the Brighton Railway Company, and another part, to the South-eastern Railway Company; and the proceeds were paid into Court. The remainder of the estate was still unsold.

On the hearing of a petition, presented by *Christiana Whiting*, the testator's only surviving sister, to have the rights and interests of the petitioner and the other persons interested in the funds in Court and the unsold part of the estate, declared, the question was whether the real estate was converted, out and out, into personalty by the will.

Mr. *Bethell* and Mr. *Freeling* appeared for the petitioner, but, as she took the same share of the property whether it was converted or not, they took no part in the argument.

Mr. *Hodgson*, Mr. *Chandless*, Mr. *Willcock* and Mr. *Hislop Clarke*, for the parties interested in contending that the property was not converted, said that the will contained, not a general direction to sell the real estate, but a direction to sell it for a particular purpose and in a particular event only, namely, to provide for the payment of the wife's annuity in case the rents should be insufficient to pay it in full, and, in that case, no more was to be sold than that purpose required; and that the testator afterwards directed his trustees to pay the residue of *the rents*, to his wife for her life; and that, subject to the

payment of her annuity and of the other annuities given by his will, he gave the estate, not through the medium of any trust, but by a direct devise and in the state in which it should be found at his death, to his sisters, and, in the subsequent part of his will, he treated his real estate as remaining *in specie*; therefore, the whole scope of the will shewed that the testator had no general intention to convert his real estate into personalty.

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Mr. *Stuart* and Mr. *Walker* appeared for other parties.

The VICE-CHANCELLOR :

This case must be decided in precisely the same way as it would have been if a suit had been instituted, shortly after the testator's death, for the administration of his estate, and it had appeared that the income of his real and residuary personal estate was not sufficient to pay the annuity.

It is quite plain, from the words of the will, that the trust for sale would have arisen as soon as that fact was ascertained; and the Court must have directed it to be carried into effect immediately.

The proviso in the subsequent part of the will, is not inconsistent with the preceding part. It does nothing more than authorize the trustees (whether there had been a sale or not) to dispose of the whole or part of the *corpus* of the property, in purchasing the annuity or such part of it as the income might not be sufficient to pay, that is to say, it is only another mode of providing for the payment of the annuity in full.

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I have only one more observation to make, which is that, where the testator speaks of the shares of his sisters, he speaks of them as becoming due and payable. Now who ever heard of shares of real estate becoming due and payable?

Declare that the testator's real estate was converted, out and out, into personalty, by his will.

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6th November.

DAVIS v. COMBERMERE.

DAVIS v. MORIER.

Debtor and Creditor.

Interest.

New Orders.

A. claimed a debt before the *Master*, in an administration suit. The executors resisted the claim, and the *Master* disallowed it; but a suit was afterwards instituted in which the claim was established, and liberty was given to A. to apply for payment of his debt in the administration-suit.

BOTH the above-mentioned suits were instituted by the executors of the late *W. F. Greville, Esq.*, the first, for the administration of his estate, and the second, on the recommendation of the *Master* to whom the first had been referred, for the purpose of determining whether a claim upon the deceased's assets which had been made before him, but which the Plaintiffs had resisted and he had disallowed, could be supported*. The result of that suit was in favour of the claim (a); and the decree in it declared that, *Morier*, the claimant, was entitled to stand as a creditor against the estate of

* The claim was made, after the *Master* had made a separate report as to the deceased's debts, in consequence of the Plaintiffs having required the claimant to repay 457*l.* which they had paid him.

(a) See 2 Coll. Rep. 303.

Held that, as he had not established his debt in that suit, he was not entitled to interest upon it, under the 41st General Order of August, 1841.

W. F. Greville, for 453*l.*, the amount of his claim, and for his costs of the suit; and it gave him liberty to make such application in the administration-suit, respecting the same, as he might be advised (*b*). Accordingly he presented a petition, intituled in the two suits, and praying that the Plaintiffs might be directed to pay him his debt and costs out of the assets in their hands, with interest at 4*l.* per cent., on his debt, from the date of the decree in the administration-suit.

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Mr. *Walpole* and Mr. *Giffard*, for the petitioner, said that the only question was as to the petitioner's right to interest on his debt; and they relied on the 41st Order of August 1841 (*c*) in support of that right.

Mr. *Toller*, contra, said that the 41st Order applied only to creditors who had gone in under the decree in an administration-suit, and established their debts before the *Master*, in that suit; and that, as the petitioner had not done so, and had not even made any claim before the *Master* until after the *Master* had made his report as to debts, he was not entitled to interest under the 41st Order.

Mr. *Bethell* and Mr. *Fisher* appeared for other parties.

THE VICE-CHANCELLOR :

The petitioner did not go in before the *Master*, under the decree in the administration-suit, and establish his debt under that decree; but, in consequence of some proceedings which took place, before the *Master*, in that suit, another suit was instituted, and the debt was established in that suit. Therefore, I consider that he is not entitled to the benefit of the 41st Order.

(*b*) See 2 Coll. Rep. 303. (*c*) See Beavan's Orders, 177.

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6th & 7th Nov.

Waste.
Husband and
wife.
Tenant for life.
Condition.

A lady, tenant for life of an estate, subject to a condition not to commit waste, married; and, during the coverture, her husband cut and sold timber on the estate.

Held, (in opposition to the doctrine in *Lord Ormonde v. Kynnersley*, 5 Madd. 369), that the condition was not in the nature of a trust, and, consequently, that neither the wife nor her estate, but the husband alone, was answerable for the waste.

KINGHAM v. LEE.

THOMAS HARDING devised his freehold estate to his wife, *Ann*, for her life, *she keeping the building thereon in good repair, and committing no manner of waste*, and not felling any timber on the estates, except for repairing the buildings; and, after her death, he gave the estates to a trustee in trust to sell the same.

The testator died in 1805, and the bill alleged that his widow entered into the possession or receipt of the rents of the estates as devisee thereof for life, subject to *the trust* or condition, imposed upon her, of keeping the buildings on the estates in good repair, and committing no manner of waste: and that, in accepting the devise and entering into possession as aforesaid, she entered into an implied promise or undertaking to perform *the trust* or condition imposed upon her as aforesaid. The bill further alleged that, in April 1807, the wife married the Defendant *Roger Lee*; and that, thereupon, the Defendant became and was seised of or entitled to the estates, in her right, during their joint lives; and that *the trust* or condition annexed to her estate as aforesaid, thenceforth, *attached to or upon him* and he became bound by the like implied promise or undertaking as aforesaid: that, upon the marriage, he entered into the possession or receipt of the rents of the estates, and continued in such possession or receipt during the rest of his wife's life: that, whilst he was in such possession, he did not keep the buildings in good repair, as he was bound to do, but suffered them to fall into a state of dilapidation, and also committed waste by felling timber growing on the estates and selling such timber; and

That, by such voluntary and permissive waste, the estates were, at his wife's death, greatly deteriorated in value : That his wife died in January 1844, having made a will or testamentary appointment dated in November 1843, and thereof appointed the Defendant, *Roger Lee*, and her son, the Defendant, *Charles Lee*, executors, and, in August 1844, letters of administration of her personal estate, with her will annexed, were granted to them, and that they had possessed or received her *separate personal estate* or some part thereof.

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The bill did not contain any other allegation that Mrs. *Lee* had separate property ; but it stated that *Roger Lee pretended* that, by his marriage settlement, the estates were conveyed to trustees, during the joint lives of himself and his wife, in trust to pay the rents to his wife for her separate use, and that, he also pretended, that a power was, thereby, reserved to her to appoint a sum of 2500*l.* by deed or will, and that she exercised that power by her will. But the bill charged that, if any settlement was made upon the marriage, it was made with *Roger Lee's* privity and consent, and that he was a party thereto, and that the trustees thereof never received or paid anything in respect of the estates, or intermeddled with the possession, management or enjoyment thereof, but left such possession, management and enjoyment to *Roger Lee*, and that he received all the rents of the estates ; and that he would sometimes admit so ; but that he then pretended that he acted, solely, on behalf of his wife, and that he received and applied the rents for her use and benefit.

The bill prayed for an account of all waste committed or permitted, by *Roger Lee*, or by him and his late wife or either of them, in or upon the estates ; and that the

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amount or value of all voluntary waste so committed, and of all dilapidations suffered thereon, by him, or by him and his late wife or either of them, might be ascertained and, in case the Court should be of opinion *that Mrs. Lee's estate ought to be charged* in respect of the waste and dilapidations aforesaid, or any of them, then that all proper directions might be given, in that behalf, against *Roger Lee* and *Charles Lee* as her persons representatives.

Charles Lee put in a general demurrer.

Mr. *Bethell* and Mr. *J. F. Hargrave*, in support of the demurrer, said that that part of the prayer which sought to charge the estate of Mrs. *Lee*, could not be supported; for, first, the bill did not allege that any of the wrongful acts of waste which it complained of, had been committed by Mrs. *Lee* before her marriage with *Roger Lee*; secondly, that it nowhere stated that Mrs. *Lee* had any separate estate, and, thirdly, that it imputed all the acts of waste to *Roger Lee* alone, and alleged that all the profits arisen from those acts, had been received by him. They referred to *Clough v. Dixon* (a), *Mompenny v. Bristow* (b), and *Lansdowne v. Lansdowne* (c).

Mr. *Stuart* and Mr. *Campbell*, in support of the bill, contended that Mrs. *Lee* took the estates subject to a trust to keep the buildings on them in repair; and that she did not get rid of that obligation, by marrying, but her original liability remained, notwithstanding her husband was liable also; and that, by her own act, she had enabled her husband to commit the waste com-

(a) *Ante*, Vol. VIII., page 594.

(b) 2 Russ. & Myl. 117.

(c) 1 Jac. & Walk. 522.

plained of, and, therefore, her estate as well as her husband's, was answerable for it. They relied on *Caldwall v. Baylis* (d), *Lord Ormonde v. Kynnersley* (e), *Garth v. Cotton* (f), *Adair v. Shuro* (g), and *The Duke of Leeds v. Lord Amherst* (h). They added that *Lansdowne v. Lansdowne* was distinguishable from the present case; for Lord *Lansdowne*, the tenant for life, was unimpeachable of waste; and that, in *Clough v. Dixon*, the Vice-Chancellor did not decide that Mrs. *Bond* was not liable for the *devastavit*, but merely reserved the question as to her liability.

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The VICE-CHANCELLOR:

I do not wish to hear the reply.

This case has been made important by the ingenious argument that has been brought forward against the demurrer, namely, that, where an estate for life is given, with certain directions which impose an obligation, on the tenant for life, not to be guilty of waste either voluntary or permissive, there a trust arises by necessary implication. That doctrine is quite new to me; and I cannot but think that the language attributed to Sir *John Leach*, in *Lord Ormonde v. Kynnersley*, which was referred to in support of that doctrine, is metaphorical, and was not intended to be taken literally: at all events, I cannot accede to the proposition which he is supposed to have laid down.

If a person to whom an estate for years is given, coupled with an express trust to raise money for pay-

(d) 2 Mer. 408.

(g) 1 Scho. & Lef. 243.

(e) 5 Madd. 369.

(h) *Ante*, Vol. XIV., page

(f) 1 Dickens, 183.

375; 2 Phill. 117.

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ment of debts or to do any other act, assigns the term to a third person upon the trusts declared, he is guilty of a breach of trust, because he had no authority to make the assignment. So, if it were the doctrine of this Court, that, where an estate for life is given with certain restrictions as to waste, a trust is created, the tenant for life could not part with his interest, without being guilty of a breach of trust. But such is not the doctrine of this Court. Where an estate for life is given, subject to a condition or obligation not to commit or permit waste, the tenant for life has the same unrestricted power to vest the estate in any other person, as he would have had if it had not been subject to any condition or obligation whatever: but this Court would, of course, interpose to prevent either him or his alienee from doing any act which would be a breach of the condition or obligation, and would make them, if they were living, or their assets, if they were dead, answerable for any benefit which they might have derived from such breach.

I shall now make a few observations which are more immediately applicable to the present case. Mrs. Lee, under the will of her first husband, was entitled to his estates for her life, subject to an obligation to keep the buildings on them in repair, and not to fell timber or commit any other waste upon them. Subject to that obligation, her interest in the estates was her own beneficial interest. The necessary consequence is that she might have granted it to any other person; and, had she done so, she could not have been held responsible, either at law or equity, for the future acts of her grantee. She, however, continued seised of the estates until she married the Defendant *Roger Lee*. By that marriage, her sole seisin was suspended, and she and her second

Husband in her right, became seised of the estates; but the whole beneficial interest was in her husband during the coverture; and, she having become incapable of doing any act, every act that was done with respect to the estates was the act of her husband alone, and no responsibility attached to her, but he alone was responsible for them. Therefore, if the bill had positively averred that Mrs. Lee had separate property, this Court could not have made it answerable for the acts of waste complained of by the bill, all of which were committed during the coverture. The consequence is that the bill cannot be sustained as against her personal representatives.

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This case was likened to the case of *Clough v. Bond*, where an executrix married, and, during the coverture, the assets of the testator were wasted. I admit that, in such a case, a creditor or legatee of the testator has a right to sue the executrix or administratrix as well as her husband. But that right arises from the fiduciary character which the executrix or administratrix originally sustained. In the present case, Mrs. Lee took the estates under her first husband's will, and continued to hold them, until her second marriage, free from any trust whatsoever; and, consequently, there is a substantial difference between this case and *Clough v. Bond*.

As I am clearly of opinion, for the reasons that I have stated, that the demurring Defendant has been improperly made a party to the suit, I shall allow the demurrer with costs.

Mr. Stuart.—Roger Lee was the only Defendant to the bill as it was originally filed. Charles Lee, the demurring Defendant, was made a party by amendment,
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in consequence of a suggestion, in *Roger Lee's* answer, that he was a necessary party; and, therefore, I submit that the demurrer ought not to be allowed with costs.

The VICE-CHANCELLOR.—That suggestion ought not to have been attended to; and, therefore, I shall give the Plaintiff the costs of the demurrer.

1846:
10th, 11th, and
16th November.

*Copyholds.
Corporation.
Local Act of
Parliament.
Lord and
Copyholder.*

THE GRAND JUNCTION CANAL COMPANY
v. DIMES.

BY a local Act of Parliament passed in 1793, certain persons were incorporated by the name of the Grand Junction Canal Company, and empowered to purchase lands in the parish of *Rickmansworth* in *Herts*, and in other parishes in that and other counties, for the purpose of making the Grand Junction Canal, and towing-paths and other works connected with it: and, for the purposes aforesaid, the company were empowered to enter upon the lands of any person or persons, and to set out such parts thereof as they should think necessary for making the canal and other works, and to do all other matters and things which they should think convenient and necessary for making and using the same,

By a local act of Parliament, a company was incorporated, and empowered to purchase certain lands; and all persons seised, possessed of, or interested in those lands, were empowered to convey their right and interest therein to the company, in the form prescribed by the act, which, notwithstanding some of the lands were copyhold, was adapted to the conveyance of freeholds only. A copyholder used that form, and, afterwards, died, without having made any surrender of the tenements comprised in it, to the lord of the manor.

Held that the company, being a corporation, were not entitled to be admitted to the tenements, but that they were entitled to have the customary heir of the deceased tenant admitted; and the Court declared that, on his admittance, he would be a trustee for the company.

they making satisfaction, in manner thereafter mentioned, to the owners or proprietors of, and all persons interested in the lands, tenements and hereditaments which should be taken, used or prejudiced, for all damages to be by them sustained in or by any of the powers of the act.

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And, after reciting that a map or plan, describing the lines of the then intended canal and collateral cuts and the lands through which the same were intended to be carried, together with a book of reference, containing a list of the names of the owners or reputed owners and occupiers of such lands, had been deposited at the office of the clerk of the peace for each of the counties in which such lands were situate, it was enacted that such maps or plans and books of reference should remain in the custody of the respective clerks of the peace, and that all persons should have liberty to inspect and peruse the same, and to make copies thereof and extracts therefrom; and that the company, in making the canal and cuts, should not deviate more than one hundred yards from the respective lines thereof described in the said maps, plans and books of reference, without the consent of the person or persons through whose lands or grounds such deviation should be made: and that, after any part or parts of the said lands or grounds should be so set out or ascertained as aforesaid for making the canal, cuts and other works therein mentioned, it should be lawful for all persons who were or should be seised, possessed of or interested in any lands, grounds or hereditaments which should be so set out and ascertained for the purposes aforesaid, to contract for, sell and convey the same to the company; and that all such contracts, sales and conveyances should be valid and

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effectual in law, to all intents and purposes whatsoever, any law, statute, usage or custom to the contrary notwithstanding, and that such of them as should be made of any lands or hereditaments to the company, should be made in the form thereafter set forth. The act further enacted that the owners and occupiers of lands through, in or upon which the canal and the collateral cuts, towing-paths and other works thereby authorised, were intended to be made, might accept and receive satisfaction for the value of such lands, and for the damages to be sustained by making and completing the works thereinbefore directed, either in gross sums or by annual rents, as should be agreed upon between the said owners and occupiers respectively, and the company; and that, from and immediately after the time of making and executing such sale and conveyance or any contract or contracts for the same, the company should be at liberty to enter upon, and, from thenceforth for ever, to have, take and enjoy the said lands for the uses and maintenance of the canal and cuts, without any interruption or eviction whatsoever: and, in case the company and the parties interested in such lands, could not agree as to the amount or value of such satisfaction, provisions were made, in the subsequent sections of the act, for ascertaining and settling, by commissioners duly qualified as owners of freehold or copyhold estates or otherwise as therein specified, and for assessing, by the verdict of a jury, what sums of money should be paid, by the company, (either in gross or by an annual rent or payment) for the absolute purchase of or as a recompense for the use of the lands which should be set out and ascertained as aforesaid, and the compensation to be made, by the company, for any damages to be sustained, as therein mentioned, by any persons being owners of or interested

in any lands. The act further enacted that, upon payment or legal tender of such sum or sums of money as should have been contracted or agreed for between the parties, or determined and adjusted by the said commissioners, or assessed by such juries, for the purchase of any such lands, to the proprietor or proprietors of such lands, or to such other persons as should be interested therein or entitled to receive such money, at any time after the same should have been so agreed for, determined or assessed, or if the persons so entitled or interested, or any of them, could not be found or should refuse to receive the same, then upon the investment thereof in such public funds or government securities as the commissioners should appoint, or upon the same being deposited as therein mentioned, it should be lawful for the company and their agents, workmen and servants immediately to enter upon such lands; and that, then and thereupon, such lands and the fee-simple and inheritance thereof, together with the yearly profits thereof, and all the *estate, use, trust and interest of any person or persons therein*, should, from thenceforth, *be vested in and become the sole property of the company*, to and for the purposes of the act, for ever; and that such tender, payment or investment, should not only bar all right, title, claim, interest and demand of the person or persons to whom the same should or ought to have been made, but also should extend to, and should be deemed and construed to bar the dower of the wife of any such person, and all estates tail and other estates, in reversion and remainder, of his her or their issue, *and of every other person whomsoever therein*. The act further enacted that the commissioners should settle what shares and proportions of the purchase or compensation money for damages, which should be agreed for, determined and adjusted or assessed as aforesaid, should be allowed to any tenant,

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or other person or persons having a particular estate, term or interest in the premises, for his, her or their respective interests therein, *and with due regard to the rights and interests of the lord or lords of any manor or manors whereof the land to be affected by the canal were holden*: and it empowered the owners of lands through or adjoining which the canal should be made, to build and use wharfs, warehouses and other conveniences on their own lands adjoining the canal: and it authorised *the lords of manors* through which the canal should pass, to build and use wharfs, warehouses and other conveniences on the wastes; and it made provisions for vesting the rates to be paid for the use of such wharfs and warehouses, in such lords of manors or landowners and their representatives; and, in case of the default of any of such lords of manors or landowners after notice as therein mentioned, it empowered the company to make use of any of such lands or wastes for constructing wharfs, warehouses and other conveniences, *they first making satisfaction for the same in such manner as thereinbefore directed with respect to other lands which should be taken or used for the purposes of the act* — The act then contained regulations as to the wharfage to be taken, by such lords of manors and landowners, for goods in or upon their wharfs, and a provision for securing to them the exclusive use of their private wharfs and warehouses. And it further enacted that the lord of every manor through which the canal should be made, should be entitled to the right of fishery in so much of the canal as should be made over, under or through the common or waste land within his manor, and as should be made over or through any other lands in the waters whereof such lord then had or was entitled to the right of fishery; and that the owner or owners of and persons interested in any other lands through which the canal

should be made, should also be entitled to the like right of fishery in so much of the canal as should be made in, over, under or through his, her or their lands respectively, or as should be made in, through or over any common or waste lands wherein they had any right of fishery before the passing of the act; and it empowered the lords of such manors and the owners of such lands, to take and kill game upon so much of the canal and other works as should be made through their respective lands: and it declared that nothing therein contained should extend to prejudice or affect the right of any lords of any manors or of any owners of any lands in, upon or through which the canal or any of the towing-paths or other conveniences aforesaid, should be made, to the mines and minerals within or under the said lands; and it reserved all such mines and minerals, and power to work and get the same, to the lords of such manors and to the owners of such lands respectively; and it made provision for cases where there should be occasion to cut through, take or use part of any commons or waste grounds, for the purposes of the canal; and it declared that the conveyance thereof by the lord of the manor wherein the same should be situate, should be a good and sufficient conveyance to the company, for the purpose of vesting in them the fee-simple and inheritance thereof.

By an act passed in 1801, it was enacted that, if any contract, agreement, bargain, sale or exchange of or concerning any lands *thereafter* to be purchased, taken or used by virtue of the powers of the former act or that act, (over and above what had been taken and already contracted for on account of the canal, collateral cuts and the towing-paths thereof), should be made or entered into, of any such lands, tenements or hereditaments

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which should be copyhold, the same should be executed and completed by surrender thereof, in the court of the manor of which the same was or were holden, according to the custom of such manor, and that such lands should continue subject to the same fines, rents and services as were due and payable and of right accustomed, in the same manner as if the now stating act had not been made, unless the lord of the manor for the time being should be willing to enfranchise the same; in which case such lord was thereby empowered so to do, notwithstanding he should be seised or entitled to the same manor for a less interest than an estate of inheritance in fee-simple; but, inasmuch as the vesting and continuing of such copyhold premises in the company as a body corporate, would prevent such lord from receiving such benefits of fines, heriots and other service due upon death, descent or alienation, in like manner he would have done in case such copyhold premises had continued to be the property of persons in the natural capacities, the now stating act declared that, in case the lord should decline to enfranchise the respective parcels of copyhold land, held of the manor, which should thereafter be so purchased by or vested in the company, he should be entitled to and should be paid, by the company, a reasonable recompense and satisfaction for the loss that would arise to him, in respect of such fines, heriots or other services the enjoyment of which would be diminished or lost by the vesting and continuing of such copyhold premises in a body corporate; and that such recompense and satisfaction, if not settled by agreement between the parties, should be ascertained and settled by the commissioners appointed in such manner, and subject to such verdict of a jury (if required) as was directed by the former act, or by arbitration in manner therein enacted.

In March 1797, *Joseph Skidmore*, being seised in fee of divers copyhold lands held of the lord of the manor of *Richmansworth*, parts whereof were situate in the line of the canal, the Plaintiffs purchased those parts of him for 308*l.* 10*s.*; and, on the 13th of March 1797, he, in consideration of that sum, *conveyed them*, to the Plaintiffs, by a deed-poll in the form prescribed by the first-mentioned Act of Parliament, that is to say, he *granted and released* them and all his right, title and interest thereto and therein, to the Plaintiffs, to hold to them for ever, by virtue and according to the true intent and meaning of the act; and, at the same time, he executed a bond to indemnify the Plaintiffs against the payment of all quit-rents, heriots, customs and services which might be thereafter claimed or demanded, by the lord of the manor, in respect of the premises comprised in the deed-poll; and, shortly after the execution of those instruments, the Plaintiffs took possession of the premises, and made their canal and a towing-path through and over the same.

At the date of the deed-poll, *H. F. Whitfield* was seised in fee of the manor. In 1831, it became vested, after two mesne conveyances, in the Defendant, *Dimes*, in fee.

In May 1835, *Joseph Skidmore* died, leaving his son, the Defendant *Thomas Emmott Skidmore*, an infant of the age of eighteen, his customary heir: and, no person having claimed to be admitted to the premises on his death, *Dimes*, after proclamations made at three successive manor-courts, issued a warrant for seising them into his own hands as lord of the manor: and, in June 1838, he brought an ejectment against the Plaintiffs in the

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Queen's Bench, and, ultimately, recovered possession of the premises.

The bill, after stating as above, alleged that, though the lord of the manor might be *legally* entitled to recover the premises as aforesaid, *the Plaintiffs were entitled either to be admitted themselves, or to have the Defendant Thomas Emmott Skidmore or such other person as they might appoint, admitted to the premises; and that they had requested the Defendant, Dimes, to make such admission accordingly, and had offered to pay him the proper fine and fees on such admission; but that Dimes, notwithstanding he was not entitled to hold the premises for any longer period than until the person entitled to be admitted thereto, should come in and claim to be admitted, had refused to comply with such request, and threatened and intended to stop the navigation of the canal. The bill charged that the Plaintiffs were entitled under their Acts of Parliament, and that they intended, if necessary, to purchase the lord's interest in the premises.*

The bill prayed that *Dimes* might be decreed to admit either the Plaintiffs, or *Thomas Emmott Skidmore*, or such other person as the Plaintiffs should appoint, to the premises, the Plaintiffs offering to pay such fine and fees as might be properly payable on such admission, and also submitting, if necessary but not otherwise, to purchase all the estate and interest of the lord of the manor in the premises; and that *Dimes* might be restrained from obstructing the navigation of the canal.

Shortly after the bill was filed, the *Vice-Chancellor* granted the injunction, on the Plaintiffs paying 1050*l.*

into court, as a security for what might become due in respect of the fine on the admission of *Thomas Emmott Skidmore* to the purchased premises. In December 1838, the *Lord Chancellor*, on appeal, varied the *Vice-Chancellor's* order by directing that the 1050 *l.* should be paid as a security for what might become due in respect of the fine on the admission of any copyhold tenant whom the Court might be of opinion ought to be admitted; the Plaintiffs undertaking that any fine which the Court might think proper to direct to be paid, should be assessed according to the then value of the property*.

It appeared, from the evidence in the cause, that, in 1829, a gentleman named *Boodle* had been admitted tenant of certain copyholds held of the manor, as a trustee for Lord *Grosvenor*, the purchaser of them.

The cause now came on to be heard.

Mr. *Stuart*, Mr. *James Parker*, and Mr. *Busk*, appeared for the Plaintiffs.

Mr. *Stuart*, after commenting upon the Acts of Parliament, said that the conveyance from *Joseph Skidmore*, vested, in the Plaintiffs, the entire interest of the copyhold tenant in the pieces of land comprised in it, and that *Dimes* was entitled to keep possession of them, not *in perpetuum*, but only *quousque*, that is, until some person should claim to be admitted to them; and, as the Plaintiffs had claimed, by their bill, to be admitted, *Dimes* was bound to admit them, though they were a corpora-

* The customary fine payable on the admission of a tenant, was two years' improved value.

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tion (a); that, at all events, he was bound to admit the heir of *Joseph Skidmore*, (who was the tenant on the rolls of the manor), as their trustee, on their paying the proper fine and fees; and that they were not compellable to purchase *Dimes's* interest in the property, as lord of the manor.

The *Vice-Chancellor*.—Supposing that the Court should be of opinion that the lord cannot be compelled to admit *Thomas Emmott Skidmore*, because his father, *Joseph Skidmore*, did not die seised of the tenements in question (b), are the Plaintiffs willing to purchase such right as the lord may have in them?

Mr. *James Parker*.—That question can hardly arise; for all the proceedings of the lord have been taken on the footing that *Joseph Skidmore* did die seised. He seised *quousque*, on that very ground, because no one came in to be admitted. And we contend, first, that the Plaintiffs themselves are entitled to be admitted; but if the Court, for any reason, should think that that is not the case, then we submit that, beyond all doubt, the person who has been proceeded against, by the lord, to compel him to come in and be admitted, namely, the heir of *Joseph Skidmore*, is entitled to be admitted. The statutory conveyance operated in one of two ways: it either vested in the Plaintiffs, both at law and in equity, the customary estate of inheritance which *Joseph Skidmore* had; or it left that estate in him at law, and made him a trustee of it for the Plaintiffs: but, in either way, the Plaintiffs are entitled to what they ask.

(a) Coke's Complete Copyholder, sect. 49; and Duke's Char. Uses, 3rd edit., pp. 108, and 109.

(b) The estate of a surrenderor remains in him until the admittance of the surrenderer.

[The *Vice-Chancellor*.—My impression is that the conveyance vested, in the Plaintiffs, all the copyhold interest that *J. Skidmore* had, both at law and in equity, but left the rights of the lord unaffected.] Although it is the rule of law that general expressions, in an act of Parliament, relating to land, do not apply to copyholds, yet, if the act appears, on the face of it, to be intended to apply to copyholds, they will be held to be included in it: and as we find that the first of the company's acts empowered them to take whatever lands might be in the line of the canal, the necessary intendment is that copyholds as well as freeholds are included in it. The ninth section empowers all corporations and persons who should be seised, possessed of or interested in the lands to be set out for making the canal and the works connected therewith, to contract for, sell and convey the same to the company; and it declares that all such contracts, sales and conveyances, shall be valid and effectual in law, to all intents and purposes, any law, statute, usage or custom to the contrary notwithstanding. Therefore we might contend that the conveyance made by *J. Skidmore* to the company, operated not only as a surrender, but also as an admittance, leaving the lord either to bring an action or to seize for his fine. It is, however, sufficient for our purpose to contend that the conveyance operated as a surrender only; and we now come for admittance. If there is a surrender, the surrenderee is at full liberty to decide, for himself, at what time he shall be admitted. In the present case, the lord was never damnified, at all, by the company not being admitted. During *J. Skidmore's* life, he had a tenant on the roll, and had all the fines and services which he was entitled to. When *Skidmore* died, he seized the tenements, as, we do not and cannot now dis-

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pute, he had a right to do. [The *Vice-Chancellor*.—The question really comes to this: whether the corporation, by dealing with the copyhold tenant alone, have acquired a right, as against the lord, to have themselves admitted? If a tenant in fee on the court-rolls chooses to surrender to the use of a corporation, is the lord bound to admit the corporation in a case in which nothing has taken place, between him and the corporation, which has given them any right as against him?] Looking at the objects of the Act of Parliament, it is impossible to say that it can have contemplated that the corporation who were established for the purposes of it, were not to have the means of getting a complete title against all parties. The only question is as to the amount of the fine; and we admit that it ought to be much greater than it would be on the admittance of a single individual, or even of several joint-tenants, and that the proper course is to leave it to a jury, to ascertain the amount.

Supposing, however, that the statutory conveyance operated only as a surrender, and that the lord cannot be compelled to admit the company as being a corporation, then we submit that he is bound to admit the heir of *Joseph Skidmore*. For *Joseph Skidmore* died seised of the property in question, and the lord has so admitted by proceedings which he has taken; and if he died seised, what was vested in him is now vested in his heir, and, therefore, the lord is bound to admit the heir; and, as was the case on the admittance of *Mr. Boodle*, to allow it to appear on the roll that he is a trustee, and who are the parties beneficially entitled. *Snook v. Mattock* (c).

Mr. *G. L. Russell*, for *Thomas Emmott Skidmore*, said that his client was willing to be admitted to the tenements in question, if the Court should be of opinion that he ought to be admitted, and to hold them in trust for the company.

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Mr. *Randell* appeared for two Defendants named *Boham* and *Martin*, who had been made parties as claiming an interest in the manor, but who disclaimed by their answer.

Mr. *Bethell*, Mr. *Humphry*, and Mr. *Smythies*, appeared for the Defendant *Dimes*.

Mr. *Bethell*.—I submit that the bill ought to be dismissed.

The Plaintiffs insist, first, that they themselves are entitled to be admitted to the property in question ; and, secondly, that *Thomas Emmott Skidmore*, or some other person, is entitled to be admitted as their trustee. The first of those propositions may be easily disposed of, and, therefore, I shall pass it over for the present, and proceed to address myself to the second.

It is impossible to hold, consistently with the act of 1793 and with what was done under it, that *Joseph Skidmore* retained, at his death, any interest whatever in the property ; and, consequently, no interest in it could pass to his heir : and if the company now find themselves in circumstances of difficulty and embarrassment, it is owing entirely to their having thought proper to take, from *Joseph Skidmore*, a bond of indemnity against the claims of the lord of the manor, instead of dealing with the lord, under the act, as they might and

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ought to have done, for the purchase of his rights and interest in the property. The act does not speak of the interest of the copyhold tenant or of the lord, in the lands required for the purposes of the canal, but it speaks of the interest in those lands as one entire and absolute interest, and it gives the person or persons having that interest, the power of selling and conveying, and the company the power of treating for and acquiring it: and it provides that all such contracts, sales and conveyances shall be valid and effectual in law, to all intents and purposes whatsoever; any law, statute, usage or custom to the contrary notwithstanding. That provision shows that the parliamentary conveyance was intended to vest, in the company, all the interest in the land, of whatever tenure it might be, and whether that interest was vested in one person alone, or partly in one and partly in another. The company, however, deliberately abstained from entering into any treaty, with the lord, for the purchase of his rights and interest in the land, and contented themselves with taking a conveyance of the tenant's interest only. Therefore, if they are now placed in a situation of difficulty, it is one in which they chose to be placed; and, that being the case, there is not the least ground for the Court to interfere, in order to relieve them from their difficulties. The rights and interest of the lord were untouched by the conveyance; but all the right, title and interest of the tenant, passed by it to the company; and, therefore, they cannot say that the tenant had any interest of which he was a trustee for them.

Supposing, however, that all that I have said with regard to the effect of the act of 1793 and of the conveyance under it, is to go for nothing, and that some interest did remain in *Joseph Skidmore* which was de-

ascendible to his heir, I submit that this Court has no jurisdiction to compel the lord to admit the heir as a trustee for the company: for no lord of a manor is bound to admit a trustee unless by special custom, the existence of which must be most strictly proved: but it is not even alleged that there is any such custom in this case. There may be one instance of the admittance of a trustee, but *that* is not sufficient to establish the custom: it may have been the voluntary act of the lord. What I have said with regard to the admittance of *Skidmore's* heir, applies with much greater force to the admittance of a mere nominee of the company.

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I shall now advert to the first of the two propositions advanced by the Plaintiffs, namely, that they themselves are entitled to be admitted to the property. The lord of a manor may admit a corporation if he pleases so to do, but no lawyer would attempt to maintain, as an unqualified proposition, that he is compellable to do it. *The Attorney-General v. Lewin (d)*, *In re Paddington Charities (e)*, *Brook's Abr.*, tit. *Faalty, Rowbottom v. The Corporation of St. Alban's (f)*. This proposition is so abundantly clear, that it is unnecessary for me to say anything further in support of it: and I shall conclude by observing that, if *Skidmore's* heir had been entitled to be admitted, the bill ought to have been filed by him, and not by the company; for this Court has no jurisdiction to decree admittance to a copyhold estate, except at the suit of the party who is himself entitled to be admitted to it.

- (d) *Ante*, Vol. VIII., p. 366. the record in this case. It is, probably, the same as *Ranshaw v. Robottom*, cited in 1
(e) *Ibid.* 629. *Scriven. on Cop.*, 4th edit., p. 197, n. (o).
(f) The learned counsel was furnished with a copy of

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Mr. *Humphry*.

The questions for the consideration of the Court are, whether the company are entitled to be admitted to the tenements in question as a corporation, or by *Thomas Emmott Skidmore* as their trustee?

With respect to the parliamentary conveyance, it is not necessary for us to say, positively, what is its precise character and effect: it is sufficient to say that it has not prejudiced, in any degree, the rights of the lord of the manor, or given the company any right to be admitted to the tenements, or to have any person admitted for them. It has been the rule, from the earliest times down to the present, to put a rigid construction upon acts of Parliament for making canals and other public works; and accordingly, the general words, "lands and tenements," have been held not to include copyholds, where the rights of the lord would be in any manner prejudiced by holding that they were included. [*The Vice-Chancellor*.—I understand that the maps and plans which are referred to in the act of 1793, include copyholds.] They include the lands, but do not describe them as copyhold. I do not, however, mean to contend that copyholds were not intended to be taken under the act: I admit that they were: but I submit that the Legislature intended the company to buy up every interest in the lands through which the canal and the works connected with it were meant to be carried, that is to say, with respect to such of them as were copyhold, the interest of the lord as well as the interest of the tenant, and not the interest of the tenant only. The act not only uses the term, 'lands,' which means the fee-simple in them, but it expressly empowers all persons who should be seised, possessed of, or *interested in* the lands to be set out for the purposes of the act, to

Contract for, sell, and convey the same to the company. Now, is it possible to contend that the lord of a manor is not *interested* in the lands held by his copyhold tenants? Is not the freehold of them vested in him? and may they not become his absolute property by escheat, forfeiture, and otherwise? As, then, he is interested in the lands, he is capacitated to sell and convey his interest. This point is put beyond all doubt by a subsequent section, which enacts that the owners of lands through which the canal and other works were intended to be made, (that is to say, the owners of such lands, so far as they have an ownership in them), may accept and receive satisfaction for the value of them; and that, upon payment or tender of such value, the fee-simple and inheritance in such lands, and all *the estate, use, trust, and interest* of any person or persons therein, shall from thenceforth be vested in and become *the sole property of the company*. As, then, it is perfectly clear that the intention of the Legislature was that the rights and interest of the lord should be bought up, the parliamentary conveyance that has been executed, cannot be said to have given the company any right to be admitted to the tenements, or to have any person admitted as a trustee for them; for such a right would be inconsistent with the intention of the Legislature. Besides, the works which the act authorized to be made, show that the interest of the lord as well as the interest of the tenant, were intended to be purchased; for those works could not be proceeded with to any extent, without violating the lord's rights and incurring a forfeiture of the tenements.

Mr. *Humphry* then referred to other provisions in the act of 1793, which he said were inconsistent with the company becoming copyhold tenants, and to the

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form of the conveyance prescribed by the act, in order to show that nothing like trusteeship was contemplated, but that the legal estate in the lands authorized to be purchased, was intended to be vested in the company. He then argued that the lord of a manor was not *bound* to admit either a corporation, or a trustee, except by special custom: and added, that the act of 1841, which related to lands to be thereafter purchased, gave, *for the first time*, power to the company to become copyhold tenants, and power to lords of manors to decline to enfranchise copyholds to be taken by the company.

He cited, first, *Coke's Complete Copyholder*, sect. 5; *Lister v. Lobley* (g), *Peachy v. The Duke of Somerset* (h), *Weaver v. Maule* (i), *The Attorney-General v. The Duke of Leeds* (k), *Blakemore v. The Glamorganshire Canal Company* (l), *Gray v. The Bury and Liverpool Railway Company* (m); and, secondly, *Tonkin v. Croker* (n), *Brook's Abr.*, tit. *Fealty*, pl. 15, Co. Lit. 68. b., and *Wilson v. Hoare* (o).

Mr. *Smythies*.

The heir of *Joseph Skidmore* has no estate or interest in the tenements in question, in respect of which he can be admitted to them.

If the lord of the manor had conveyed his rights and interest in the tenements, to the company, either before or immediately after the conveyance by *J. Skidmore*,

(g) 7 Adol. & Ell. 124.

See 162.

(h) 1 Strange, 447.

(m) 9 Beav. 391. See 400.

(i) 2 Russ. & Myl. 97.

(n) 2 Lord Raymond, 860.

(k) 2 Myl. & Keen, 343.

(o) 2 Barn. & Adol. 350.

(l) 1 Myl. & Keen, 154.

and in the same form, nothing would have been left to descend to his heir; for every party having an interest would have parted with it, and the fee-simple would have been vested in the company; and so the argument for the Plaintiffs admits. I ask, then, by which of those two conveyances would the inheritance of the heir have been destroyed? Would it have been destroyed by the deed of the ancestor, or by the deed of the lord? It could not have been destroyed by the deed of the lord, for *that* could have passed nothing but the interest of the lord; therefore, the inevitable conclusion is that it would have been destroyed by the deed of the ancestor. How, then, can it be said that the heir has not lost his inheritance, because the lord has not conveyed his interest? That argument leads to this absurdity,—that the lord, by conveying his own interest, would pass something that was not vested in him but in another person.

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There is no inconsistency between my argument and the decision at law. The question to be determined at law, was whether the conveyance by *Skidmore* operated as an admittance as well as a surrender; that is to say, whether *Dines* was entitled to seize the tenements for want of a tenant; for, if the conveyance did not operate as an admittance, there was clearly no tenant at the time of the seizure. But it was not at all necessary for the court of law to decide at what time the tenancy became vacant. Whether it became vacant at the time of the conveyance or at *Skidmore's* death, was quite immaterial. The only question was whether it was vacant at the time of the seizure; and the Court, being of opinion that it was vacant at that time, decided in favour of *Dines*, the Plaintiff in the action. That decision, therefore, is perfectly consistent with my proposition that

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Skidmore's conveyance passed all his interest in the tenements, and left nothing to descend to his heir.

A court of equity, in decreeing admittance to copyholds, exercises the same jurisdiction as a court of law does; and therefore it is bound to follow the law. It has no power to enlarge customs, or to deal with copyholds in a manner different from that which is prescribed by the usages of the manor. Consequently, it cannot decree the lord to admit a corporation, or to admit a trustee, unless there be a special custom to warrant it. Again, a court of law never grants a *mandamus*, except on the application of the party who is himself entitled to be admitted; and therefore a court of equity cannot make any decree in the present case: 1 *Watkins* on Copyholds, 4th edit., pages 299 and 299.

The act of 1801 has no application to the present case, for it is not retrospective. At all events, no argument can be deduced from it with regard to the effect and operation of the conveyance of March, 1797.

Mr. *Stuart* replied.

The VICE-CHANCELLOR:

The difficulty in this case has arisen from the fact, that, at the time when the act of 1793 was passed, sufficient consideration was not given to the circumstance, which must have been apparent, namely, that a portion of the land to be taken was copyhold. If that circumstance had been brought to the attention of the framers of the act, I cannot but suppose that more special provision would have been made with respect to the matter of the conveyance than we find in the act. But, as it stands, it seems to me that the act has

authorized any person who had any right, title, or interest in the lands to be set out and ascertained for the purposes of the canal and the works connected with it, to convey all his right, title, and interest by a conveyance in the prescribed form.

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Now, Mr. *Skidmore* was a copyholder in fee in the ordinary sense, and the corporation took from him a conveyance, for a valuable consideration, in the very terms of the act; and the act, in the body of it, declares that it shall be lawful for all persons who shall be seised, or possessed of, or interested in any lands which shall be set out and ascertained for the purposes aforesaid, to contract for, sell, and convey the same and every part thereof unto the company, and that all such contracts, sales, conveyances, and assurances shall be valid and effectual in law, to all intents and purposes whatsoever, any law, statute, usage, or custom to the contrary thereof in anywise notwithstanding; and then the form of conveyance is given, which form itself expresses that the party who uses it, grants and releases, to the company, all his right, title, and interest.

It appears to me that the act, in this part of it, was providing for the conveyance, by a party who had an interest, of his interest, and his interest only; and that it did not mean, where a party, by the prescribed form, conveyed his interest, that he should be taken to convey anything which trespassed upon the rights of others, or would tend to derogate, in any degree, from the rights of others.

Then the case is that Mr. *Skidmore*, being a copyholder in fee, does, for valuable consideration, use this form of conveyance. Then what was the character

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which, according to the plain construction of the act, he sustained before he executed the conveyance? He was a copyholder in fee, who had a right, against the lord, to have his copyhold of inheritance continued by admission, from time to time, of the heir of the party who was tenant upon the roll. I cannot conceive that the act could be so construed as to give this effect to the conveyance, namely, that it should pass to the company, at once, the absolute right of the copyholder, just as if he had surrendered to the corporation, and the lord had admitted the corporation. That I cannot conceive, because that would necessarily have had the effect of making the use of the prescribed form of conveyance by the tenant, pass something which did not belong to him, namely, part of the right of the lord. Therefore, I must take it that the proper mode of construing the act, is that, by that form of conveyance, *Skidmore* passed all his interest in the land, except that, for the purpose of continuing the inheritable interest in the land upon his death, he retained the right to have his heir admitted, in order to continue the inheritance to his grantee for valuable consideration. Therefore I do not think that he altogether ceased to be a copyholder; but my opinion is that he remained a copyholder, and became a trustee of the remaining right which he had as such, for the purpose of giving full effect to that form of conveyance which, in the way in which it was constructed, could not pass the whole absolute interest of the copyholder in the same way as if he had surrendered, and the surrenderee had been admitted; but which did everything short of that.

Then the lord himself has admitted, by the proceedings which he has taken, that there was a copyhold tenant upon the roll: for, upon the death of that copyhold

tenant, he seized the tenements *quousque*, that is, until the heir of the tenant on the roll should come in and claim to be admitted: and the lord has established his right of seizure at law. Then, if he has a right to seize *quousque*, there is a corresponding right, in the heir of the tenant on the roll, to say to him: "I will be admitted upon payment of the proper fine." And my opinion is that the heir of the copyhold tenant has that right, but has it merely as a trustee for the corporation; and that the proper thing to be done, in this case, is to give effect to the whole transaction so far as you can, without violating the rights of any one. Therefore, it would be extremely improper to direct that the corporation shall be admitted against the will of the lord; but my opinion is that the corporation have a right to say, against the will of the lord: "You shall admit that person who, *de facto*, is the copyhold heir of the tenant upon the roll," that is, of Mr. *Skidmore*. It may be true that Mr. *Skidmore* did not die seised of the tenements; but my opinion is that, though he may not have died seised as against the corporation, yet, for the benefit of the lord, (whose interest the act never meant to affect), he must be taken to have died seised in the same way as he would have done if he had not conveyed.

Therefore I shall declare that the heir of *Joseph Skidmore*, according to the custom, ought to be admitted as tenant upon the court-roll, and that, when he has been admitted, he will be a trustee of such estate as he gets by that admission, for the corporation. The corporation must pay the fine and fees on his admission; and it must be referred, to the *Master*, to settle the amount of the fine: the injunction must be made perpetual;

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and the Plaintiffs must pay the costs of the customar-
heir and of *Boham* and *Martin*, and be repaid those
costs, together with their own costs, by *Dimes**.

The Court of Exchequer Chamber took the same view of the effect of the statutory conveyance mentioned in the preceding case, as the *Vice-Chancellor* did; as will be seen from the following extract from the judgment of that Court, on a writ of error, brought by *Dimes*, to reverse the judgment of the Queen's Bench in an action brought by him to recover the *mesne* profits of the tenements comprised in the conveyance.

Dimes v. The Grand Junction Canal Company.

June 13.

Lord Chief Justice *Tindal*:

On the argument of this case, all the questions arising in it were fully and elaborately discussed. We have considered them, and are of opinion that the Plaintiff in error is entitled to judgment.

The principal question was, as to the effect of the conveyance executed, by *Joseph Skidmore*, in the form given by the statute of the 33rd Geo. 3 (the act of 1793), section 9, by which he granted and released all his right, title, and interest to the company, for a sum of money paid to him. It was contended, on the part of the company, that the effect was to transfer all *Skidmore's* interest to the company, so that he was no longer tenant

* Affirmed by the Lord Chancellor.

to the lord, and therefore did not die seised of the tenements at the will of the lord, according to the custom of the manor; that the lord's title was barred for ever; and that, for the loss of profits derived from it, the only remedy was by applying for compensation under the act; and, at all events, that, if his title continued, he could not seize *quousque*, for the default of the infant tenant in not coming in to be admitted.

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The counsel for the Plaintiff, on the other hand, insisted that the effect of the statutory conveyance was only to transfer such interest as the tenant himself could transfer without the concurrence of the lord; that it operated in the nature of a surrender; that, until the admittance of the new tenant, the old one continued seised; that the lord was not bound to accept a corporation as his tenant, for he would be deprived of the fruits of his seignory; and, consequently, that he could proceed, on the death of the tenant, *Skidmore*, in the usual way, to compel his heir or devisee to be admitted, and, he not appearing, to seize *quousque*, although the tenant was an infant; and that he could, after seizure, maintain his ejectment, and was not bound, or indeed entitled, to claim compensation under the act.

And we think that the conveyance of the tenant transferred all that the tenant could transfer without the lord, but no more; the lord's title remaining as before. It was probably by an oversight that the framers of the act did not expressly include copyholds and provide for the interest of the lord. In a subsequent statute of the 41st Geo. 3, c. 71 (the act of 1801), the Legislature has done so; and a similar provision has been made in various railway acts, and others mentioned in the course of argument. But we think that sufficient appears, in

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this act, to include every species of title and tenure, and have no doubt that the lord would have been bound, and the title of the company complete, if he and the copyhold tenant in fee had joined in, or each separately made a conveyance in the statutable form: but, if the tenant makes a conveyance without the lord, it is impossible that he can be considered as representing the lord, or that the lord's right could be thereby transferred.

The 30th section of the 33 Geo. 3, upon which reliance was placed, directs the commissioners to settle the shares of the purchase-money or compensation for damages, to be allowed, to persons having a particular estate, for their interests, with a due regard to the rights and interests of the lord of the manor. This section may be meant to apply to cases where the lord joins in the conveyance; at all events, the clause is too uncertain to take away his right; and it is to be recollected that it is the company who are to suffer by the vagueness and obscurity of their own act.

On the argument upon a motion, in the Court of Queen's Bench, for a new trial in the ejectment, the late Mr. Justice *Littleale* and my brothers *Patteson* and *Williams*, were all of opinion, as appears by a manuscript report with which we have been furnished, that the conveyance by the tenant did not affect the lord's rights, and could not possibly operate as a parliamentary enfranchisement; and they directed the verdict to be entered for the Plaintiff. It is to be observed that, in the report of their judgments, not the least notice is taken of the objection to the Plaintiff's recovering, which has been so strongly pressed in the argument before us, namely, that the lord could not sue, because

he was to receive compensation under the act for the injury to his seignory; therefore it must be inferred that that point had not been insisted upon by the Defendant's counsel. And the view of the case taken by the Court of Queen's Bench was confirmed by the *Vice-Chancellor of England* (on the motion for the injunction), who held that the effect of the bargain and sale was not to convey the legal copyhold estate, but, being a conveyance for valuable consideration, the tenant of the estate became a trustee of the copyholds for the company; and Lord Chancellor *Cottenham*, on appeal, confirmed this opinion; for he said that the Court of Queen's Bench had decided that the conveyance did not affect the interest of the lord, and it never occurred to him to dispute the judgment of that Court. "The act of Parliament," his Lordship observed, "authorizes the copyholder to release his right to the company, and the act says they shall have the same interest as he had; they therefore would have the tenancy during the life of the copyhold tenant, and then the lord would enter for want of a tenant." We think, therefore, that no interest passed to the company except what the tenant could convey. They chose to rest contented, as they had a right to do, with the title of the copyhold tenant, and not to purchase that of the lord. The consequence is that they are in a similar situation to that in which they would have been placed if they had chosen to purchase a long term of years from a termor, and leave the reversion in fee outstanding. In that case the reversioner, when the term expired, would have a right to treat the company, if by its officers it occupied his land, as trespassers; and they would be so until they paid the purchase-money, (see sections 20, 25, and 30 of the 33rd Geo. 3); and the lord might bring ejectment, as Lord *Ellenborough* said where a canal company took land limited to one

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for life (without paying the value of the land, or a compensation), and the remainderman applied for a mandamus: *The King v. The Stainforth and Keadby Canal Company (p)*. In like manner, whenever the legal right of the lord of the manor to possession of the tenements begins, the land becomes his estate; and, when he has taken possession, the company are trespassers, unless they choose to purchase what is now the land of the lord.

Upon referring to the material clauses of the act (the 5th, the 16th, the 17th, the 21st, the 24th and the 25th), it appears to us that the company are enabled, not bound, to purchase or acquire the right of making the canal in the lands specified in the act. If they choose to do so, they are to pay the price or recompense, for the use of the land, agreed or assessed by the commissioners or a jury; and *that* before they enter upon the land. If they decline, the rights of the landowner remain as before: and, as to damages, those necessarily resulting from the making of the canal, such as damages by severance, are to be paid in the same way as the purchase-money for the land; those arising to the adjacent lands, mills, &c. from the making, maintaining or repairing the canal or its feeders or reservoirs, or from the oozing of water from the canal, or from obstructions of water-courses, must be separately assessed and paid, and must be claimed in six months. But the provision for compensation for damage is only such as is caused, to the land itself, by the making or maintaining of the canal. There is no compensation given for injury to the tenure; nor does the making of the canal in the least injure *that*. The rights of the lord and the fruits of the tenure remain,

er the making of the canal, exactly the same as fore: and, as soon as his title to the land itself arises forfeiture or otherwise, and he gains possession, he is exactly in the same position as a landowner whose lands the company have not agreed to purchase.

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It appears to us, therefore, that the Court of Queen's Bench took a proper view of this part of the case. The defendant retained his right, because he had never been compelled upon to sell, and never sold it; and the tenant had no power, by the act, (and it would have been singular if he had), to sell it for him; and this is not a case for compensation by way of damages.

The counsel for the Defendants then insisted that, if the company had acquired no legal right by the conveyance to them, the Plaintiff had still no right to enter *profectu tenentis*, for several reasons: first, because the tenant's heir was an infant at the death of the tenant, and the lord's right to enter and seize *quousque*, was taken away by the 11 Geo. 4 & 1 Will. 4, c. 65, (this statute provides, by section 9, that no infant or feme covert shall forfeit any copyhold land for neglecting and refusing to be admitted thereto, or to pay the fine on which admittance), and that a seizure *quousque*, by which the lord obtained the profits until the infant came in, was a forfeiture within this enactment: and of this opinion was the Court of Queen's Bench, which, deciding with the Plaintiff on the ground that his title was not barred by the Canal Act, gave judgment against him upon the construction of this section. A short time before this, the Court of Exchequer had given a different judgment, in the case of *Doe d. Twining v. Muscott (a)*, with respect to a feme covert, and held that

(q) 12 Mee. & Wel. 832.

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the word, 'forfeiture,' in this clause, was to be construed in its proper sense, and did not exclude the right of the lord to seize *quousque*. But that case was not reported at the time of the argument in the Court of Queen's Bench, and was not cited. We have now to decide which of these two constructions of the statute is correct: and we all agree in thinking that the infant heir and not the devisee under *Skidmore's* will, took the legal estate. Prior to that case, there was no decision of a court of law upon this question: but there was an authority of a court of equity, not long after the passing of the 9 Geo. 1, c. 29, which contained a similar clause. Lord Chancellor *King*, in the case of *North v. The Earl of Stafford* (*r*), held that, if a feme covert would not come to be admitted, the Plaintiff might enter and seize, though he is reported to have decided that he might seize as *forfeited*, which, in the proper sense of that word, is inaccurate; and, on that ground, he held a demurrer to a bill against the husband and wife for the recovery of a fine on admittance, to be good. It is said, indeed, that Lord *King* did not refer to the statute: but it can hardly be supposed that he was not aware of its provisions. The case of *Doe d. Tarrant v. Hellier* (*s*) was mentioned as an authority; but, although the point was argued, the Court decided the case on other grounds.

In this state of the authorities, with opposing decisions in two courts, we are to consider which is right: and, although this point is by no means free from doubt, it appears to us that the reasons against that of the Court of Queen's Bench, ought to prevail.

The term, 'forfeiture,' *primâ facie*, means the loss of

(*r*) 3 P. Wms. 148.

(*s*) 3 Term Rep. 162.

the estate. The loss of the profits *quousque*, is not properly a forfeiture, as is explained by Mr. Justice *Bayley* in delivering the judgment of the Court of King's Bench in *Doe d. Bover v. Trueman* (t): he says that it is not to be so considered; but that it is rather in the nature of process, at the instance of the lord, by way of *cape* or *distringas*, to compel an appearance by the heir, than a forfeiture: and therefore the Court held that a succeeding lord could avail himself of it; which he could not, if it were a forfeiture properly so called. And *Watkins* on Copyholds, tit. Admission, p. 230, treats the power of seizure as arising from the right of the lord to resume, on the death of the ancestor, the possession of lands which returned to him and might become the subject of a new grant: and it is clearly a right not arising from special custom, but legally incident to every manor. "The lord may seize *quousque*, without custom; but seize as forfeited he cannot, without custom." *The Earl of Salisbury's case* (u) * *

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The only question, therefore, is, whether this right is taken away by the 11 Geo. 4 & 1 Will. 4, c. 65. The Court of Queen's Bench held that a seizure *quousque* was included in the term, 'forfeiture;' because, otherwise, the operation of the statute would be limited to cases where there was a special custom for infants and persons under disability to forfeit, and it could not be conceived that cases of such rare occurrence would be the subject of legislative enactment. Females covert would have been bound by the general custom of forfeiture, although not named: *Gilbert's Tenures*, 231, and *Sir Richard Lechford's case* (x): so that the number of instances would not be so few as

Seizure
quousque.
Stat. 11 Geo. 4
& 1 W. 4, c. 65.
The right of
a lord of a ma-
nor to seize
quousque, is not
taken away by
11 Geo. 4 & 1
W. 4, c. 65.

(t) 1 Barn. & Adol. 736. (u) 1 Lev. 63. (x) 8 Co. 99 a.
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was supposed. But, admitting that they were, we cannot agree that the smallness of the evil to be remedied, if the words are understood in their strict and proper sense, is a good reason for reading them in another and different sense. The Court of Queen's Bench, apparently, did not sufficiently advert to the great inconvenience to the lord, so forcibly pointed out in the argument before us, if he should be obliged to act under the provisions of the statute, and to appoint a guardian or an attorney for infants or other persons under disability, in all cases. He cannot know the copyholder's title; whether the right to admission is in an heir, devisee or appointee, or who the heir or the other person entitled is. The tenant in possession has an interest to conceal the title, and to hold the land; and, if the lord admits the heir by guardian, and brings his ejectment for the fine, he may be turned round by the tenant in possession shewing another to be the true heir, or by a will: and if he admits the devisee, he may be defeated by evidence of a prior deed of appointment. It would appear, however, at the first sight, to be inconsistent, (if the meaning of the statute were to preserve to the lord the right of seizure *quousque* under which he would be entitled to all the profits until the heir appeared), that the Legislature should give him those special powers, by the exercise of which he could not take the whole profits, but only to the amount of the fine. This apparent incongruity may, however, be removed by considering that it may be of greater benefit to the lord, in some cases, to assess a fine at once: because if, after admission, the tenant dies, a new tenant would be liable to another fine; and so the lord would gain two fines: whereas, if the tenant died before admission, he would gain one fine only from his successor. Besides, if the lord has a limited interest in the manor,

as an estate for life, it might be more advantageous to him to assess the fine immediately, than to *quousque*, and take all the profits.

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The title of the Act of the 9 Geo. 1, c. 29, from which the act in question is taken, is to enable lords of manors more easily to recover their fines, as well as to protect infants and females covert from forfeitures of copyhold estates. It recites that doubts had arisen concerning the powers of lords of manors to sue copyholds upon the neglect or refusal of persons claiming to be admitted tenants. Therefore, for ascertaining the law and providing reasonable and proper remedies for lords of manors to compel the admission of tenants, it provides that infants and females covert married by descent or surrender to the use of a last will may appear in their proper persons, or the female by attorney, or the infant, by a guardian, if he cannot, otherwise by attorney, which the act gives him power to appoint, and may be admitted; and it is further provided that, in default, it shall be lawful for the lord to nominate a guardian or attorney, and admit. The title of the act shews that its object was to give a ready remedy to the lord; not to destroy any right which he then had. The right of the lord to sue *quousque*, whether the tenant was under disability or not, could hardly be said to be a matter of doubt: but there had been a doubt as to the forfeiture of infants and other persons under disability, when they were surrenderees: for Lord Holt, C. J., differs from the three judges in *The King v. Dilliston* (y): and it may be the doubt intended to be finally settled

(y) Lutwyche, 765.

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where the surrender was to the use of a will. Add to this (as the clause in 11 Geo. 4 & 1 Will. 4, c. 65, as it stands, must be construed as the similar clause in 9 Geo. 1, c. 29; and the latter statute did not extend to infants or femmes covert taking under an appointment by deed (z)), all the rights of the lord would be taken away in the case of an infant appointee, if the clause were construed to deprive the lord of the right to *seize quousque*; as he could not, in such a case, appoint a guardian or attorney at all, under the provisions of that act. For these reasons, we think that the right of seizure *quousque* was not taken away by the statute 11 Geo. 4 & 1 Will. 4.

The learned Chief Justice, after discussing two other objections, which, he said, were of minor importance, concluded by saying that the Court was of opinion that the judgment of the Court of Queen's Bench ought to be reversed, and judgment given for the Plaintiff, *Dimes*.

(x) *Lord Kensington v. Mansell*, 13 Ves. 240.

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ewing cause against dissolving an injunction by the Defendants, *Irving* and *Brown*, were re- from proceeding, at law, to recover 3000 *l.*, for the Plaintiff, Miss *Maitland*, had given a cheque bankers, in their favour; the circumstances of appeared to be as follows:

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19th Nov.

Fraud.
Undue
Influence.
Guardian and
Ward.
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laintiff, having lost her mother when she was very was placed, by her father, under the care and pro- of the Defendant, *Maclean*, her uncle by marriage, resided with him and his wife ever since. In 1842, er died, and, she being still an infant and enti- considerable property, *Maclean* was appointed dian by the Court of Chancery. In September he attained twenty-one. In January 1846, , who had agreed to pay 5000 *l.*, on the 25th month, to *Irving* and *Brown*, (who were co- as coal-merchants), for the purchase of their and of the premises on which it was carried on, and gave them the Plaintiff's guarantee for the being made on the 14th of February then next,

A. and *B.* con-
sented to post-
pone the pay-
ment of 5000 *l.*
due to them
from *C.*, in con-
sideration of *C.*
procuring and
giving them the
plaintiff's
guarantee for
that sum, and
C., at the same
time, informed
A. and *B.*,
that the Plain-
tiff was his
niece, and was
possessed of
considerable
property; that

she had resided with him for some time; that he had been her guardian, and that she had been of age for about a year and a half.

Afterwards another arrangement was made between *A.* and *B.* and *C.*, in pursuance of which *A.* and *B.* delivered up the guarantee, and *C.* procured and gave them the Plaintiff's cheque for 3000 *l.*, and her promissory note for 1200 *l.*, as securities for his paying them those sums.

The Court granted, and, afterwards, continued an injunction, restraining *A.* and *B.* from prosecuting an action against the Plaintiff to recover the 3000 *l.*; and, notwithstanding they had obtained a verdict, it refused to order the money into court.

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in consideration of their having consented to postpone the payment until that time.

The account which *Irving* and *Brown* gave of that transaction, in their answer, was as follows: that, when the indenture for carrying the agreement between them and *Maclean* into effect was prepared, it was arranged that the 5000 *l.* should be paid on the 29th of January 1846; but, when that indenture was about to be executed, *Maclean* stated that it would be a convenience to him, if time were given to him until the 14th of February, to make the payment; and that, if such time were given, he would procure the Plaintiff's guarantee for the due payment of the said sum on the last-mentioned day; and that he then stated that the Plaintiff was his niece, and a person of large property, and that she was perfect mistress of her own actions, and was anxious to assist him on account of the relationship in which they stood to each other: and he then also mentioned *that he had been the guardian of the Plaintiff*, and that she had attained her age of twenty-one years, about a year and a half previously, and had resided with him for about a year and a half: but, the Defendants added, *Maclean* did not state to them, nor did they or either of them understand or believe that he had any influence or control over the Plaintiff, or that she was not perfectly competent to judge of the effect of giving the proposed guarantee.

The Defendants, on the guarantee being handed over to them, executed the indenture, and at the same time signed certain articles of agreement dated the 31st of January 1846, by which they dissolved their partnership: and *Maclean* and *Irving* executed a deed, by which it was agreed that *Irving* should act as *Maclean's*

agent in vending coals, the produce of certain coal-mines of which *Macleau* was the owner, and should accept five bills of exchange to be drawn upon him, by *Macleau*, for 1000 *l.* each, payable three months after date. But, as it was more usual for coal-agents to give their principals promissory notes, for coals to be sent to them, than to accept bills of exchange, *Irving*, on the 28th of January 1846, signed five promissory notes for 1000 *l.* each, in the name of *Irving & Co.*, and gave them to *Macleau* in lieu of the bills of exchange.

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The 5000 *l.* not having been paid on the 14th of February, *Irving* and *Brown* brought two actions for it, one against *Macleau*, and the other against the Plaintiff. Some negotiations afterwards took place between *Irving* and *Brown* and *Macleau*; and, on the 17th of April 1846, an agreement was made between them, in pursuance of which the actions were discontinued; the indenture between *Irving* and *Brown* and *Macleau*, and the deed between *Irving* and *Macleau*, were cancelled; and *Macleau* delivered up two of the promissory notes for 1000 *l.* each, and procured and deposited, with *Irving*, the Plaintiff's cheque mentioned at the commencement of this case, as a security for his paying, when due, the other three notes, which he had negotiated; and he procured and gave, to *Irving* and *Brown*, the Plaintiff's promissory note, as a security for his paying them 1200 *l.*, in consideration of their having cancelled the indenture between them and him; and they delivered up to him the Plaintiff's guarantee for 5000 *l.*

Macleau, however, did not pay either of the three promissory notes; and, as *Irving* had signed them in the name of *Irving & Co.* prior to the dissolution of the

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partnership between him and *Brown*, the holders brought actions on them against *Brown* as well as him. The Plaintiff's cheque for 3000*l.* was presented by *Irving* and *Brown*, as their joint property, on the 1st of May 1846, but was dishonoured: and, thereupon, they brought an action against the Plaintiff, and obtained a verdict, and afterwards entered up judgment and took out execution against her for the amount of the cheque and their costs of the action.

Mr. *Bethell* and Mr. *Bazalgette*, in support of the injunction, said that, under the circumstances stated in the answer, the Plaintiff would have been entitled to the protection of the Court, if the cheque had remained in the hands of *Maclean*; and that, as those circumstances were known to *Irving* and *Brown*, she was equally entitled to the protection of the Court as against them. *Huguenin v. Baseley* (a), *Hatch v. Hatch* (b), *Archer v. Hudson* (c).

Mr. *Humphry* and Mr. *John Baily*, for the Defendants, *Irving* and *Brown*, said that the giving of the cheque, was a transaction not between *Maclean* and the Plaintiff, but between *Maclean* and the Plaintiff on the one side, and the Defendants on the other; that the Plaintiff was in the twenty-third year of her age; and that all that the answer admitted, was that the Defendants knew that *Maclean* had been her guardian, and that she had resided with him for about a year and a half; and, moreover, that she received a valuable consideration for the cheque; for the guarantee for 5000*l.*, which she had given, was delivered up to her,

(a) 14 Ves. 273. (b) 9 Ves. 292. (c) 7 Beav. 551—

and her liability to the Defendants was thereby considerably reduced. They cited *Sanxter v. Foster (d)*, and 2 Daniell's Pract. by *Headlam*, p. 1484, in order to show that, if the injunction should be continued, the Plaintiff ought to be ordered to pay the amount of the cheque into court.

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The VICE-CHANCELLOR:

I am clearly of opinion that the injunction ought to be continued.

There may not have been, in the minds of Mr. *Brown* and Mr. *Irving*, a knowledge of the principles which govern this Court. But it seems to me to be very extraordinary that, when men of mature age, who were carrying on a lucrative business, were told, by a gentleman who was himself unable to perform his contract with them, that he would procure a young lady who was residing with him, who was possessed of a large fortune and to whom he had been guardian, to give them a guarantee for the fulfilment of his contract—it seems, I say, very extraordinary that, with full knowledge of all those circumstances, they should have, at once, acceded to the proposal, without making any inquiry or taking any pains to ascertain whether the young lady was a free agent, and perfectly willing, with a full knowledge of the consequences, to do what the guardian said he would invite her or propose to her to do.

The language of the answer is this: "That, on the 28th of January 1846, when the said indenture was

(d) Craig. & Phill. 302.

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about to be executed, the said *Donald Maclean* stated that it would be a convenience to him if time were given to him, until the 14th of February then next, for the payment of the said sum of 5000*l.*; and that, if such time were given, he would procure the guarantee of the said Plaintiff for the due payment of the said sum on the 14th of February then next; and that the said *D. Maclean* then stated to the effect that the Plaintiff was his niece, and was a person of large property, and was perfect mistress of her own actions, and was anxious to assist him on account of the relationship in which they stood together; and that the said *D. Maclean* then also mentioned that he had been the guardian of the said Plaintiff, and that she had attained her age of twenty-one years about a year and a half previously, and had resided with him for about a year and a half: but the said *D. Maclean* did not state, to the Defendants, nor did they or either of them understand or believe that the said *D. Maclean* had any influence or control over the said Plaintiff, or that the said Plaintiff was not perfectly competent to judge of the effect of giving the said proposed guarantee." Now, it seems to me a most extraordinary thing that these gentlemen, after making the admission, which they do in detailed terms, of the circumstances which existed with regard to *D. Maclean* and this young lady, should go on to say that he did not state to them, nor did they or either of them understand or believe that *Maclean* had any influence or control over her. The proposal was that, upon *Maclean's* application, the Plaintiff should give this guarantee to them, for the benefit of *Maclean*. And it is also to be observed that the proposal was not only beneficial to *Maclean*, but was beneficial to the Defendants also because, if he could not perform his agreement with

them and pay the money on the 14th of February, it was an advantage to them to have a guarantee: and yet they state, gravely, that *Maclean* did not state to them, nor did they or either of them understand or believe that he had any influence or control over the Plaintiff. They must, if they had thought proper to think, have perceived that, by adopting the suggestion of *Maclean*, (which they immediately did,) they relied on the influence that he had over the young lady.

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Now this case has been argued for the Defendants, as if it were a case in which they had some ground to resist the rule in equity, because of their not being volunteers. But no consideration whatever was given to the young lady: on the contrary, she was induced to do the act upon an application made to her by a person who, if he had performed his duty, would have advised her not to do that which he applied to her to do. She was influenced by him, or, at least, allowed by him to give this very guarantee, which was a direct benefit to all the Defendants*, in the situation in which they then stood with respect to each other. The facts of the case seem to me to amount to this: that *Irving* and *Brown*, knowing the defenceless situation of the young lady, combined with *Maclean*, who disclosed it to them, in order that advantage might be taken of her defenceless situation, for the benefit of all the three. And my opinion is that they must, all three, be considered as standing in the same situation. It is most necessary to consider the transaction in this view, because it is the foundation of the whole case. For what subsequently took place, was nothing more than a substitution of the note and the cheque, for the guarantee, which had

* *Maclean* was a Defendant.

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been given, by the Plaintiff, on the 29th of January preceding.

Having regard, then, to what has been the rule of this Court, namely, to view, with great jealousy, the exercise of any influence by persons standing in the situation of near relations, over persons just attaining their age of twenty-one years, it seems to me that this case, as it is represented by the answer, is one in which the Court is bound to interfere to the extent, at least, of continuing the injunction ; and the only question is, on what terms it ought to be continued? whether the amount of the cheque ought to be paid into court? But before I decide that point, I should like to know whether there are any funds that are available for that purpose. I observe that the answer states that the plaintiff is residing abroad with *Maclean*.

Mr. *Bazalgette*.—The Plaintiff is in such reduced circumstances, that she is utterly unable to bring the money into court.

The VICE-CHANCELLOR.—As the essence of this case is the undue influence exercised, by *Maclean*, on behalf of the other Defendants, I shall not order the money into court, but shall, simply, continue the injunction.

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IN THE MATTER OF 11 GEO. 4 & 1 WILL. 4,
c. 65.—*Ex parte* LEGH, an Infant.

1846:
20th and 21st
November.

THE 17th section of the above-mentioned act enacts:
“that, where any person, being an infant under the age
of twenty-one years, is or shall be seised or possessed
of or entitled to any land in fee or in tail, or to any
leasehold land for an absolute interest, and it shall ap-
pear to the Court of Chancery to be for the benefit of
such person that a lease or under-lease should be made
of such estates, for terms of years, for encouraging the
erection of buildings thereon, or for repairing buildings
actually being thereon, or the working of mines, or
otherwise improving the same, or for farming or other
purposes, it shall be lawful for such infant, or his
guardian in the name of such infant, by the direction
of the Court of Chancery, to be signified by an order
to be made in a summary way upon the petition of
such infant or his guardian, to make such lease of the
land of such persons respectively, or any part thereof,
according to his or her interest therein respectively and
to the nature of the tenure of such estates respectively,
for such term or terms of years, and subject to such
rents and covenants as the said Court of Chancery shall
direct; but in no such case shall any fine or premium
be taken; and in every such case the best rent that can
be obtained, regard being had to the nature of the lease,
shall be reserved upon such lease; and the leases and
covenants and provisions therein, shall be settled and
approved of by a *Master* of the said Court; and a coun-
terpart of every such lease shall be executed by the

Infant.
Statute 11 Geo.
4 & 1 Will. 4,
c. 65.
Lease.
Construction.
The Court has
no jurisdiction
under 11 Geo. 4
& 1 W. 4, c. 65,
s. 17, to lease
an infant's es-
tates, unless the
infant is inde-
feasibly seised,
either in fee or
in tail, in pos-
session.

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Ex parte LEIGH.

lessee or lessees therein to be named, and such counterparts shall be deposited, for safe custody, in the *Master's* office until such infant shall attain twenty-one, but with liberty to proper parties to have the use thereof, if required, in the mean time, for the purpose of enforcing any of the covenants therein contained; provided that no lease be made of the capital mansion-house and the park and grounds respectively held therewith, for any period exceeding the minority of any such infant."

On the hearing of a petition presented, under that section, by an infant tenant in tail *in remainder*, and consented to by the tenant for life,

The VICE-CHANCELLOR said that, regard being had to the proviso at the end of the section and to the decision of Sir C. Pepys, M. R., in *in re Evans (a)*, it was plain that the Court had no jurisdiction to grant a lease of an infant's estates, unless the infant was indefeasibly seised of them, either in fee or in tail, *in possession*.

Mr. Chapman Barber appeared for the Petitioner.

(a) 2 Myl. & Keen. 318.

TERRY v. WACHER.

THE bill was filed for an account of monies received by the Defendant on account of one *Edenden*, deceased.

1846:
2nd and 3rd
November, and
2nd December.

Account.

In June, 1834, *Edenden*, who was then about thirty-one years of age, and was much addicted to intemperance, was placed by his father to board and lodge with the Defendant, at forty shillings a week, in the hope that the Defendant (who was a farmer, and was married to his cousin) might be able to reclaim him from, or at least to check him in the indulgence of his intemperate habits. His father died in June, 1830, and under his will *Edenden* became entitled, first to an annuity of 500*l.*, and afterwards, on the death of his brother, in July, 1837, to a further annuity of the same amount. After his father's death he continued to board and lodge with the Defendant upon the same terms as before; and his father's executors paid him his annuity, by monthly instalments, at an inn in *Canterbury*, which was a few miles distant from the Defendant's residence. The Defendant always accompanied him when he went to receive an instalment; and after it had been paid to him, and he had given a receipt for it, he handed it over to the Defendant, and the latter from time to time gave him small sums, and paid his bills, which were principally for liquor. He quitted the Defendant's house about four months before his death, and went to reside with another person. The Defendant, however, continued to pay his bills. He died in February, 1842,

A. placed his son, who was much addicted to intemperance, under the care of *B.*, a relation by marriage, and, at his death, left his son an annuity of 500*l.* The son resided with *B.* for several years after his father's death, and until a few months before his own death. *B.* always accompanied him when he went to receive his annuity from his father's executors, and he, as soon as he had received it, handed it over to *B.* to keep for him; and *B.*, from time to time, gave him small sums, and paid his bills.

Held that *B.* was accountable, in a court of equity, for what he had received from the son.

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having shortly before made a will, of which the Plaintiff was the acting executor.

At the hearing of the cause, the question was whether the Defendant stood in such a relation to *Edenden*, as that a bill for an account could be maintained against him.

Mr. *Bethell* and Mr. *Boyle*, for the Plaintiff, contended that the Defendant stood in a fiduciary character to *Edenden*, and therefore was bound to account for the monies which he had received.

Mr. *Stuart* and Mr. *Lloyd*, for the Defendant, said that no permanent relation subsisted between *Edenden* and the Defendant, but that every receipt of money by the latter was a separate transaction, and was properly the subject of an action at law. They cited *Foley v. Hill* (a), *Dimwiddie v. Bailey* (b), *Wells v. Cooper* (c), *King v. Rossett* (d), and *Frietas v. Dos Santos* (e).

THE VICE-CHANCELLOR :

The sole question to be decided in this case, is whether it sufficiently appears that the Defendant stood in a fiduciary character with regard to *Edenden*.

Although it may be true that *Edenden* was, to some extent, capable of acting for himself, yet it cannot be said that he was in full possession of his faculties; for it appears from the evidence, not only that he was in a state of intoxication during a portion of almost every

(a) 1 Phill. 399.

(b) 6 Ves. 136.

(c) Ibid. 139, cited.

(d) 2 Youn. & Jer. 33.

(e) Ibid. 574.

day, but that, when he was perfectly sober, there was a degree of imbecility about him. When he went to receive his annuity, the Defendant (under whose care he had been placed by his father) accompanied him; and he handed over the money to the Defendant to keep for him. Therefore, the Defendant received the money in a fiduciary character; and, having so received it, he became liable to account for it.

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WACHER.

It may be true that there are certain classes of persons whom a court of equity will not compel to account; such as servants entrusted with money for the payment of tradesmen's bills; but they are merely the channels through which the money is to pass. Here, however, the Defendant was, for five years, in the habit of receiving and paying money on *Edenden's* account; and, if I were not to hold that such conduct made him liable to account, I should subvert the principles upon which this Court has acted ever since the time of Lord *Eldon*.

Therefore, there must be a decree for an account from the death of *Edenden* the father, with costs; but, as the Plaintiff has entered into a great deal of unnecessary evidence, he must pay the costs of that evidence.

NEATE v. PINK.

1846: *Ex parte* T. FLETCHER and J. B. YATES, of
 1st December. *Liverpool, Merchants.*

Jurisdiction.
Petition.
Practice.

A testator died seised of a moiety of a plantation in *Jamaica*. *A.* and *B.*, the owners of the other moiety, granted a lease of it to the trustee and executor of the testator's will. He died before the lease expired. After his death, certain persons resident in *Jamaica* were appointed receivers and managers of the testator's estates, in a suit in this country, for the execution of the trusts of the will; and a merchant in *London* was appointed consignee and receiver of the produce of the estates. The managers and receivers took possession of the entirety of the plantation, and shipped the produce to the consignee, but did not pay *A.* and *B.* any rent. *A.* and *B.*, though not parties to the suit, petitioned, in it, to be paid the arrears of rent due to them, out of the funds in the cause, which had arisen from the balances paid in by the consignee.

The Court directed a preliminary inquiry, with a view to granting the prayer of the petition.

JOHN HIATT, the testator in the cause, was the owner of one moiety of a plantation in *Jamaica*, called *Fellowship Hall*; and *Fletcher* and *Yates* were the owners of the other moiety. After the testator's death, they granted a lease of their moiety to *John Pink*, who was in possession of the other moiety as the trustee of the testator's will. *Pink* died before the lease expired. On his death, his executors entered into possession of the entirety of the plantation, and, for some time, paid the rent reserved by the lease; but, afterwards, they discontinued to pay it. Whilst they were in possession, the suit mentioned in the title to this case, was instituted by parties interested under the testator's will; and, in pursuance of an order made in it, certain persons residing in *Jamaica*, were appointed managers and receivers of the testator's estates, and *John Horsley Palmer*, a merchant in *London*, was appointed receiver and consignee of the profits and produce of those estates. The Plaintiffs then instituted a suit in the Court of Chancery in *Jamaica*, under which the receivers and managers appointed as before mentioned, were let into possession of the whole of the testator's estates, including his moiety of

the *Fellowship Hall* plantation ; and they took possession of the other moiety also, and worked the entirety of the plantation and consigned the produce of it to *Palmer*, without distinguishing between the produce of the moiety which belonged to *Fletcher* and *Yates*, or paying them any rent in respect of such moiety. Under those circumstances, *Fletcher* and *Yates* brought an action, in *Jamaica*, against the managers and receivers of the testator's estates, for the use and occupation of their moiety of the plantation ; and they recovered a verdict, but did not enforce it, because they were advised that, to do so, would be a contempt of the Court of Chancery. However, they presented a petition in the *Jamaica* suit, and obtained an order by which they were permitted to enter into possession of their moiety of the plantation ; and the *Master* was directed to ascertain what compensation ought to be made to them for the use and occupation of it ; and the managers and receivers of the testator's estates were ordered to pay the amount, when ascertained, out of any monies then in, or thereafter to come to their hands, in respect of those estates. But, as there never had been, nor was it likely that there ever would be, any fund standing to the credit of the suit in *Jamaica*, *Fletcher* and *Yates*, instead of prosecuting the last-mentioned order, presented a petition, in the suit in this country, praying that an agreement, which they had entered into with some of the parties to that suit, to accept 2000 *L*. in satisfaction of their claim, might be carried into effect, and that the 2000 *L*. might be paid to them out of the funds in the cause, which had arisen from the balances from time to time paid in by the consignee and receiver in *London* and from the compensation money for the slaves on the plantation ; but, if the Court should be of opinion that the compromise ought not to be carried

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into effect, then that the *Master* might be directed to inquire and state what was justly due and owing, to the petitioners, from the testator's estate, in respect of the matters before mentioned, and that the amount to be found due might be paid to them out of the funds in the cause.

On the petition coming on to be heard, the Counsel for the Respondents objected that, as *Fletcher* and *Yates* were not parties to the suit, they could not present a petition in it; but must either file a bill in order to obtain what they asked by their petition, or must wait until the suit should be heard, and then apply to the Court for leave to go in under the decree and be examined *pro interesse suo*: and that, at all events, it would be premature to make any order in favour of the petitioners, in the present state of the cause.

The VICE-CHANCELLOR :

The persons who were in possession of the petitioners' moiety of the plantation, were the officers of the Court; and it is perfectly plain that the petitioners could not deal with them as they might have done with persons not sustaining that character. Indeed, it appears, from the petition and the affidavits in support of it, that all the proceedings which they took to obtain their rights, were ineffectual. Where the Court has been in possession of a stranger's land by its officers, and has derived profit from it, but has not paid him any rent or made him any other remuneration, it never ought to be made a question whether the Court should do justice to him. If any nobleman or gentleman had occupied the land of another by his steward, he would not hesitate, on application being made to him, to satisfy the owner for the use and occupation of his land. Ought, then, this

Court to set an example of dishonesty, and refuse to compensate the petitioners for the occupation of their property, merely, because they happened to be prevented, by a legal difficulty, from asserting what was their plain right?

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The order which I shall make in this case, is that it be referred to the *Master* to inquire and state whether any and what sum or sums of money paid into this Court in this cause, by Mr. *Horsley Palmer*, the *London* consignee and receiver, has or have arisen from the produce, proceeds, or profits of the petitioners' moiety of the *Fellowship Hall* plantation; and that, until the *Master* shall have made his report or until further order, no funds standing to the credit of this cause, shall be paid out, without notice to the petitioners; and I shall give the *Master* liberty to state special circumstances, and reserve further directions on the petition, and the consideration of the costs of it; with liberty to apply*.

Mr. *Bethell*, Mr. *Stuart*, Mr. *James Parker*, Mr. *Rolt*, Mr. *Piggott*, Mr. *John Baily*, and Mr. *Hardy*, were the counsel in the case.

* In *Wastell v. Leslie*, a lady entitled to an annuity, which the receiver in the cause was directed to pay to her, charged it with the re-payment of 100 *l.* lent to her by one *Carter*, who, some time afterwards, presented a petition in the cause, praying that the receiver might be directed to pay him the 100 *l.* out of the monies coming to the annuitant.

Mr. *James Parker*, and Mr. *Heathfield*, supported the petition, and Mr. *Bethell* opposed it on behalf of the annuitant.

The VICE-CHANCELLOR held that, as the lady appeared by counsel and opposed the petition, he had no jurisdiction to make the order; but that a bill must be filed.

6th November, 1846.

COOPER v. WEBB.

1846:
16th and 17th
December.
1847:
11th January.

THE Plaintiff sued on behalf of himself and all the other shareholders in a railway company, except the Defendants.

*Pleading.**Parties.**Joint-stock
Company.**Railway
Company.**Demurrer.*

A joint-stock company was formed for making a railway; but, some time afterwards, the project was abandoned. One of the shareholders then filed a bill, *on behalf of himself and all the other shareholders,* except the

The company was formed for making a railway from York to Lancaster, and was provisionally registered in 1845. The capital was to be 1,600,000 *l.*, in 64,000 shares of 25 *l.* each. The Defendants were the members of the committee of management of the company; and the bill alleged that they took upon themselves the entire management of its affairs; that the Plaintiff, after he had paid the deposit on his shares and executed the subscribers' agreement and the parliamentary contract, discovered, and the fact was that the Defendants might have disposed of all the shares in the company; but that they had disposed only of 52,320, including those which they had retained for themselves, and that that number of shares, even if the full amount thereof had been paid, would have been greatly insufficient to enable them to prosecute the undertaking. The bill then set forth the parliamentary contract from a copy in the

members of the managing committee, who were made Defendants, praying for an account of the monies received, and the expenses properly incurred, by the Defendants, on account of the company; that the Plaintiff, *and the other shareholders, might be declared liable to contribute* to such expenses in proportion to the number of their shares, or in such other proportion as the Court should think just; and that such proportion might be deducted out of the deposits on their shares, and the residue be repaid to them; and *that the surplus of the monies in the hands of the Defendants, after discharging the debts and liabilities of the company, might be applied in aid of the objects of the suit, as the Court should direct.*

A demurrer to the bill, for want of equity and want of parties, was overruled.

Plaintiff's possession, and alleged that, at the date of that instrument, the Defendants well knew, and the fact was that the allotment of shares which they had made, was insufficient to raise the capital necessary for the formation of the railway, and that it had become and was then wholly out of their power to carry out the objects of the company, and that the purposes for which the company was proposed to be established, were then frustrated *and had become impracticable*; and that the Defendants ought then to have stopped the further prosecution of the undertaking, and to have returned, to the Plaintiff and the other shareholders on whose behalf the Plaintiff sued, the deposits paid by them on their shares, after deducting a proper proportion for their share of the preliminary expenses; but, they proceeded with the undertaking, and caused surveys to be made and plans and sections to be prepared of parts of the proposed line, and incurred other expenses, the whole of which were useless and improper; and they applied to Parliament for an act to authorize the construction of the railway, but their application was rejected for non-compliance with the standing orders of the House of Commons: whereupon they resolved to abandon, and did abandon the undertaking, and published advertisements stating that, in accordance with the wishes of the majority of the proprietors, they had determined to dissolve the company and to return, to the shareholders, thirty shillings per share*, on their signing a deed of dissolution and release; but, as the Defendants refused to render any account of their receipts and payments in respect of the undertaking, the Plaintiff and the shareholders on whose behalf he sued, refused to execute the deed.

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* The deposit on each share was 2*l.* 12*s.* 6*d.*

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The bill charged that, under the circumstances stated, the company *ought to be dissolved and the affairs thereof wound up*, and the accounts taken under the direction of the Court; and that, in taking such accounts, the Defendants ought not to be allowed to charge or retain, out of the monies received by them for deposits on shares, any expenses which they had incurred in prosecuting the undertaking after they knew it had failed; that, if the Defendants had, as they alleged, expended 36,853 L on account of the company (but which the Plaintiff did not admit), the amount of the deposits received by them was sufficient to leave, in their hands, a balance of 22,007 L after deducting the 36,853 L and paying the thirty shillings per share which they had offered to return to the shareholders: *that the Defendants improperly and fraudulently allotted or otherwise disposed of a great number of shares to the directors of other railway companies, in consideration of shares in such other companies being allotted to themselves; and that no monies were ever paid, by way of deposit or otherwise, in respect of the shares which they so allotted to the directors of other companies, although the same, or the letters of allotment or scrip for the same, were sold in the market; that the value of the shares so allotted, amounted to a very large sum of money, which was lost to the Plaintiff and the other shareholders on whose behalf he sued, through such fraudulent allotment; that an account ought to be taken of all the dealings and transactions of the Defendants on behalf of the company, and of all monies received by them for deposits on shares or otherwise on account of the company, and of all expenses properly incurred and paid by them in managing and conducting the affairs of the company and promoting the formation thereof; and that a rateable distribution of such expenses ought to be made upon the Plaintiff and the other shareholders on*

whose behalf he sued, in such proportion as the number of shares in the company held by the Plaintiff and such other persons as aforesaid, bore to 64,000, being the whole number of shares originally proposed to be allotted; and that such proportion ought to be deducted from the sums paid, by the Plaintiff and such other persons as aforesaid, for deposits on their shares; and that the residue of such deposits ought to be repaid, to the Plaintiff and such other persons as aforesaid, by the Defendants; and that the outstanding monies and assets of the company, and particularly the balance then in the hands of or due from the Defendants, ought to be got in *and aid and transferred into Court to the credit of the cause, to be applied in aid of the objects of the suit as the Court should direct*: that the number of shareholders on whose behalf the Plaintiff sued, was so great, and their rights and liabilities were so subject to change and fluctuation by death and otherwise, that it would not be possible, without the greatest inconvenience, to make them parties to the suit; and that, to do so, would render it impossible to bring the suit to a termination; and that, in fact, the Plaintiff was ignorant of the names and addresses of such shareholders; and that their interests, so far as regarded the relief sought and the accounts hereafter required, were identical with those of the Plaintiff; and that none of them had interests adverse to those of the Plaintiff, in respect of the matters mentioned in the bill, or in respect of the property of the company or the surplus thereof; and that all the shareholders (other than the Defendants) were fully represented by the Plaintiff, and had a common interest in obtaining, and consented and agreed to the relief thereby prayed.

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The bill prayed that it might be declared that the ob-

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jects and purposes for which the company was proposed to be established, had failed through the neglect and misconduct of the Defendants, and that they were not justified in prosecuting the undertaking after the failure thereof; and that it might be declared that the Defendants were not entitled to pay, deduct or retain, out of the funds of the company, any expenses incurred in prosecuting the undertaking subsequent to the failure; and that an account might be taken of all monies received by or by the order or for the use of the Defendants, on account or on behalf of the company, and of their application thereof; and that the Defendants might be charged with and ordered to repay all monies which should appear to have been improperly paid by them out of the funds of the company; and that an account might also be taken and the amount ascertained of all costs, charges and expenses which had been properly incurred, paid, or sustained, by the Defendants or on their behalf, as the committee of management of the company, in or about the conduct or management of the affairs of the company, and the promotion thereof; *and that the Plaintiff and the other shareholders in the company on whose behalf he sued, might be declared liable to contribute such proportion of the amount of the said expenses as the number of shares held by him and such other persons, bore to 64,000 (the whole number of shares into which the capital of the company was proposed and intended to be divided), or such other proportion of the said expenses as the Court should, under the circumstances, declare to be just*; and that the proportion of the said expenses, so to be attributed to the shares held by the Plaintiff and the other persons on whose behalf he sued, might be deducted out of the monies paid by way of deposit on the said shares; and that the residue of the said deposits might be repaid to the Plaintiff

and the other shareholders on whose behalf he sued ; and that an account might be taken of the monies and funds of the company remaining in the hands or at the disposal of the Defendants ; and that the said monies and funds might be applied in payment of the debts and liabilities properly incurred, by the Defendants, on behalf of the company, if any such remained outstanding ; *and that the residue thereof might be paid and applied in aid of the objects of the suit, in such manner as the Court should direct* ; and, if necessary, that a receiver might be appointed to collect and get in the outstanding monies and assets of the company ; and that, in the meantime, the Defendants might be restrained from receiving or demanding payment of any of the said outstanding monies and assets, and from interfering or intermeddling therewith, in any manner, and from paying, assigning, or in any manner parting with any of the monies or assets of the company which were then in their possession or power.

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Webb and some of the other Defendants, demurred on the following (amongst other) grounds, namely, want of equity, and because all the shareholders were not parties.

Mr. Bethell, *Mr. Stuart*, and *Mr. Welford*, in support of the demurrer, said that the relief prayed by the bill could not be granted, because all the shareholders in the company were not parties to it : for, first, it did not treat the proposed railway as a bubble, but as a practicable and beneficial undertaking : secondly, that it prayed, in express terms, or, at least, in effect, that the company might be dissolved and the affairs of it wound up : thirdly, that it sought, not what would be beneficial to the shareholders at large, but to subject them to a liability, namely, to make them contribute to the expenses

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incurred by the Defendants: and, lastly, that it asked for the direction of the Court as to the mode in which the residue of the funds in the hands of the Defendants, after satisfying the debts and liabilities of the company, ought to be applied. They cited *Long v. Yonge* (a), *Richardson v. Hastings* (b), *Evans v. Stokes* (c), *Richardson v. Larpent* (d), *Hichens v. Congreve* (e), *Deeks v. Stanhope* (f), and *Wallworth v. Holt* (g), which they distinguished from the present case on the ground that the Plaintiff in that case carefully abstained from praying for a dissolution of the partnership.

Mr. *James Parker* and Mr. *Speed*, in support of the bill:

The case before the Court is not, like *Long v. Yonge*, a case of a partnership, but a case in which the Plaintiff and the persons on whose behalf he sues, have placed their money in the hands of the Defendants, for a purpose which cannot be effected: *Wylde v. Hopkins* (h), *Reynell v. Lewis* (i). The Defendants have offered to return, to every shareholder, thirty shillings per share; therefore the funds in their hands are more than sufficient to repay all the expenses and discharge all the liabilities which they have incurred on account of the intended company. [The *Vice-Chancellor*.—The bill prays that the persons on whose behalf the Plaintiff sues, may be declared to be liable to contribute to the expenses properly incurred by the Defendants, and that

(a) *Ante*, Vol. II., p. 369.

(b) 7 Beav. 301.

(c) 1 Keen, 24.

(d) 2 Youn. & Coll. Ch. Ca. 507.

(e) 4 Russ. 562.

(f) *Ante*, Vol. XIV., page

57.

(g) 4 Myl. & Cr. 619.

(h) 15 Mees. & Wels. 517.

(i) *Ibid*.

a certain proportion of those expenses may be deducted out of the deposits paid by them: is there any substantial difference between asking that a shareholder may pay a certain sum, and asking that it may be deducted out of his share? Has not every shareholder a right to know what expenses are to be charged against him?] In every creditors' suit the Court ascertains the amount to be allowed to the executors for their expenses, although one creditor sues on behalf of himself and others. One creditor or one shareholder is as much interested as another is, in diminishing the expenses to be paid out of the fund on which he has a claim. There is precisely the same identity of interest between the Plaintiff in this case and the shareholders whom he represents, as there is between the Plaintiff in a creditors' suit, and the persons on whose behalf he sues. In *Richardson v. Hastings*, Lord Langdale, M. R., says: "The prayer of this bill is, in substance, that the affairs of this concern may be wound up, which cannot be effected unless all the questions between the parties are first settled and decided. It appearing then, upon the bill, that questions probably may arise between those persons on whose behalf the bill purports to be filed, they cannot be settled in their absence." What questions are there, in this case, between the persons on whose behalf the Plaintiff sues, which must be decided and settled before the fund in the hands of the Defendants can be cleared? In *Richardson v. Larpent*, some of the absent shareholders had interests adverse to those of the Plaintiffs on the record; consequently, that case has no application to the present; for, here, there is no possibility of conflict between the Plaintiff and the shareholders on whose behalf he sues. Besides, the last paragraph of the judgment in that case, is in our favour. So also are *Wallworth v.*

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Holt, and *Deeks v. Stanhope*. The latter case goes the full length of supporting the prayer of this bill.

Two cases which have been recently decided by Vice-Chancellor *Knight Bruce*, are precisely in point: *Wilson v. Stanhope* (*k*), and *Apperly v. Page* (*l*).

The *Vice-Chancellor*.—The prayer of the bill in this case, seems to have been copied from the prayer in *Apperly v. Page*.

Mr. *Bethell* replied.

The *Vice-Chancellor*.—Before I decide this case, I should like to consider *Wilson v. Stanhope*, and *Apperly v. Page**.

1847:

11th January.

The VICE-CHANCELLOR:

This case came on upon a demurrer, and it was stated to me that the bill was almost a counterpart of the bill in *Apperly v. Page*.

Now I confess that, when I heard the argument, my opinion was very much against the demurrer. But, as I was told that the bill was designedly drawn in its present form, in order that it might have infused into it all the vital and saving properties which were found to ex-

(*k*) 2 Coll. 629.by Lord *Cottenham*, C., in

(*l*) The decision of V.-C. April 1847. See 1 Phill. 779. *Knight Bruce*, was affirmed

* Mr. *Speed* furnished his Honor with the brief in *Apperly v. Page*.

the bill in *Apperly v. Page*, I thought it right to over the bill in *Apperly v. Page*; that is to say, I read the bill in that case with the bill in this; and if there was a case in which one bill coincided with another, this is the case; because, excepting the particular facts which, of necessity, would be different in the cases, I cannot see a particle of difference between the general case in *Apperly v. Page*, and the general case in *Cooper v. Webb*. Therefore, I am absolutely bound by the decision in *Apperly v. Page*, even if my opinion did not (though, in fact, it does) concur with the judgment in that case.

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Consequently, I shall overrule the demurrer.

The Defendants appealed to the *Lord Chancellor*. At the hearing of the appeal, it was objected that, if, as was charged*, the Defendants had fraudulently sold shares to the directors of other railway companies in consideration of shares in such other companies being allotted to themselves, the allottees would be equally liable with the Defendants as participators in the fraud, and, therefore, that they ought to have been made defendants.

The *Lord Chancellor*, after observing that, as the bill alleged that the adventure had ceased, the case came within the other cases that had been decided, said: "As the directors of the other companies, it appears to me that the allegation with regard to them, is introduced for the purpose of making out a case against those who

* *Ante*, page 456.

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were directors in this company, shewing the mode in which those who are the alleged directors misconducted themselves to the *cestui que trusts*. If they have done so, they have incurred a responsibility which, in the progress of the cause, must be established, to make them liable for some contribution for the benefit of the joint shareholders; a contribution which those who purchased shares from them, would be just as much entitled to partake of, as those who, in the commencement of the company, bought the shares in the market. Consequently, the attempt to distinguish this case from the cases referred to, is not successful."

Appeal dismissed with costs*.

* See 4 Railway Cases, 582.

1847:

15th January.

*Transfer of
Stock.*

*Stat. 11 Geo. 4
& 1 Will. 4,
c. 60, s. 10.*

Construction.

In re LUNN'S CHARITY.

NEW trustees of a sum of stock were appointed, in consequence of all the former trustees being dead. The longest liver of them died intestate; but no administration had been taken out to his estate, and his son and sole next of kin refused to administer to him. Under those circumstances, an order was obtained under 11 Geo. 4 & 1 Will. 4, c. 60, s. 10, directing certain officers of the Bank of England to transfer the stock into the names of the new trustees. The Bank, however, the survivor of four trustees of a sum of stock died intestate, and his sole next of kin refused to administer to him.

Held that the case was not within the 10th section of 11 Geo. 4 & 1 Will. 4, c. 60, and, therefore, the Court could not appoint a person to transfer the stock.

would not permit the transfer to be made, on the ground that the case was not within the 10th section of the act.

1846.

In re LUNN'S
Charity.

The question was discussed by Mr. *Malins*, who supported the order, and by Mr. *Roundell Palmer*, who appeared for the Bank.

Mr. *Malins* cited *Ex parte Hagger* (a), *Ex parte Winter* (b), *Cockell v. Pugh* (c), and referred to the interpretation-clause in the act, by which the provisions relating to an executor are extended to an administrator.

The *Vice-Chancellor* said that the cases cited did not apply, for they related to executors; that executors derived their title under the wills of their testators; and, notwithstanding they might not have proved, they retained the executorial character until they renounced probate; but the next of kin of an intestate had no portion of representative character vested in him until he took out administration to the intestate; and, therefore, the case was not within the act.

The *Lord Chancellor* affirmed his *Honor's* decision, saying that the words used in the act were: "or in the name of whose *testator*," and that he had no power beyond what the act gave him.

(a) 1 Beav. 98. (b) 5 Russ. 284. (c) 6 Beav. 293.

1847 :

18th January.

KEVILL v. DAVIES.

Apportionment. *Tenant in tail and Remainderman.* *Rents.* *Stat. 11 Geo. 2, c. 19.* **JAMES KEVILL** was tenant for life of estates which, subject to his life-estate and to a term for raising portions for his daughters and younger sons, were limited to his first and other sons successively in tail. He died in 1837, leaving two sons and a daughter surviving.

At his decease, the estates were held *by yearly tenants, under parol demises*; and no alteration was made in the tenancy after his death. The suit was instituted on behalf of his three children, all of whom were infants; and a receiver of the rents of the estates was appointed under the decree. Afterwards, on the 30th of June, 1844, the eldest son died under twenty-one and without issue; and, there being a fund in Court, which had arisen from the rents of the estates paid in from time to time by the receiver, the administratrix of the deceased presented a petition stating *that the parol demises and the interests of the tenants under them, determined on the decease of the eldest son*, and praying that the amount of the rents accrued during his lifetime, including *a proportionate part thereof down to the day of his decease*, might be paid to her, as his administratrix, out of the fund in Court.

A., on his father's death, became tenant in tail in possession of estates, with remainder to his younger brother in tail. After the father's death, a suit was instituted, on behalf of *A.* and his younger brother (both of whom were infants), and a receiver of the rents of the estates was appointed. The younger brother was made a party to that suit, as being entitled to a portion out of the estates. *A.* died under twenty-one, and without issue. At his death, the estates were held, as they had been ever since his father's death, *by yearly tenants under parol demises*.

Mr. *Sidebottom*, in support of the petition :

I admit that this case is not within the recent Apportionment Act (4 & 5 Will. 4, c. 22); for the tenants

Held that *A.*'s administratrix was entitled to a proportionate part of the rents which were accruing due at his death.

held the estates under demises by parol (a) only; but it is within the equity of the 11 Geo. 2, c. 19. This depends upon the question whether the parol demises which were constructively made by the receiver during the life of the deceased son, the first tenant in tail, ought to be considered as taking effect out of the joint interest of him and his younger brother, the second tenant in tail, or out of his interest alone. If the former, the demises did not determine on the death of the first tenant in tail: Co. Litt. 45. a. If the latter, the demises did determine upon the happening of that event; and then this would be a case of apportionment within the equity of the act of 11 Geo. 2: *Paget v. Gee* (b). The tenant in tail in remainder, was not made a party to the suit on account of that remainder, but merely because he was entitled to a portion, as a younger child, and for the protection of his interest. If the bill had been filed by the first tenant in tail only, then, clearly, the receiver's demises would have determined on his death, and his estate would be entitled to the benefit of the apportionment. That estate cannot be prejudiced by the remainderman in tail being made a party to the suit, to the institution of which he could not be an assenting party by reason of his infancy. Any contracts, such as for opening mines or cutting timber, whether made by the receiver or under the direction of the Court, would have been made with a view to the interest of the first tenant in tail only, and the tenant in tail in remainder would not have been allowed to object to the contracts, however his interest might be affected by them. In fact, the Court always considers a tenant

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KEVILL
v.
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(a) See *In re Markby*, 4 Swans. 694. See also *Vernon* 171. & Cr. 484. v. *Vernon*, 2 Bro. C. C. 659.

(b) *Ambler*, 198; S. C. 3

1847.

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in tail in possession, as having the whole interest in the estate; and if, in this case, the remainderman in tail had been made a Defendant in respect only of his estate in remainder, he might have demurred to the bill as being an unnecessary party.

Mr. J. D. Chambers, for the younger son :

The tenancies did not determine, but were continued after the death of the first tenant in tail; and, therefore, at law, the rents would belong to the tenant in tail in being at the period when they became due; and, in this respect, equity must follow the law.

Mr. Sidebottom, in reply :

The tenancies did not continue after the death of the first tenant in tail, but the interests of the occupiers of the estates must be considered as created by subsequent demises.

The VICE-CHANCELLOR :

The rents, in this case, appear to me to be apportionable.

In the Matter of an ACT of the 10th and 11th VICT. c. 96, "for better securing Trust Funds and for the Relief of Trustees;" and in the Matter of the Trustees of the Marriage Settlement of J. B. WOODS and MARIA FRANCES, his Wife.

1848:
28th April.

Trust Funds.
Stat. 10 & 11
Vict. c. 96.
Practice.

BY the above-mentioned settlement, the sum of 13,333 *l.* 6*s.* 8*d.* stock, was limited, in default of issue of the marriage, to *J. B. Woods* absolutely. He died, having bequeathed the stock to his wife; and she presented a petition stating her husband's will, *and that there was no issue of the marriage*, and praying that the stock, which, since her husband's death, the trustees had transferred into Court under the act, might be transferred to her.

A lady, whose title to a sum of stock depended upon there having been no issue of her marriage with her late husband, presented a petition stating that fact, and praying that the stock, (which had been transferred into Court under 10 & 11 Vict. c. 96), might be transferred to her.

Mr. *Bethell* and Mr. *Jolliffe* appeared for the petitioner.

All the statements in the petition were verified by affidavits. But, nevertheless,

The VICE-CHANCELLOR refused to make any order, until the fact of there being no issue of the marriage had been found by the *Master*: and he directed the *Master* to inquire and state as to that fact.

The Court, notwithstanding the petition was supported by affidavits, refused to make the order until the fact on

which the petitioner's title depended, had been found by the *Master*.

1848:
5th and 8th
May.

Trust Funds.

*Stat. 10 & 11
Vict. c. 96.
Practice.*

Testator gave 2000 *l.* to trustees, in trust for such of his nephews and nieces as should be living at his wife's death, and the issue of such of them as should be then dead. Upon the wife's death, the trustees paid the 2000 *l.* into Court, under 10 & 11 Vict. c. 96. Afterwards, a petition was presented by certain persons claiming shares of the 2000 *l.*, as being the issue of a deceased nephew of the testator, and praying to have those shares paid to them.

In the Matter of the Trusts of the Will of JOHN SHARPE, Esq., deceased: and in the Matter of the ACT of the 10th and 11th VICT., "for better securing Trust Funds, and for the Relief of Trustees."

JOHN SHARPE, the testator in the cause, by his will dated the 12th October 1829, gave 2000 *l.* unto and amongst all and every or such one or more of his nephews and nieces, the children of his late sister, who should be living at the decease of his wife, or the lawful issue then living of such of them as were dead at the date of his will or should be dead at the decease of his wife, in such shares and proportions as his wife should appoint, and, in default of such appointment, amongst all such nephews and nieces living at the decease of his wife, and the lawful issue then living of such of his nephews and nieces as were dead at the date of his will or should be dead at the decease of his wife, equally, share and share alike; such issue, nevertheless, taking his, her or their parent's share only. And the testator gave his messuage, lands and other hereditaments at *Great Stanmore* in *Middesex*, to trustees, in trust for his wife for her life, and, after her death, in trust to sell and to pay the 2000 *l.* out of the proceeds: and he appointed his wife the executrix of his will.

The Court, notwithstanding the petitioners submitted to bear the costs of the inquiries necessary to ascertain their title, considered that those costs ought to be borne by the testator's estate; and also that the petitioners might be entitled to interest on their shares; and, therefore, it directed the inquiries, but without prejudice to the petitioners' right to file a bill; and it reserved the consideration of costs, and ordered the trustees to be served with the order.

He died in June 1834. His wife died in September 1847, without having exercised the power given to her by the will. After her death, the trustees sold the premises devised to them, and, out of the proceeds, paid the 2000 £ into the Bank, in the name of the Accountant-General: "In the matter of the trusts of the will of *John Sharpe*, Esq., deceased."

1848.

In the Matter of
SHARPE'S
TRUSTEES.

The testator's sister had nine children. Three of them died before his widow, without issue. Two of the other six were still living. The name of one of them was *Ann Chislett*. The others died in the widow's lifetime leaving issue.

A petition was presented by *Ann Chislett* and by the children of a deceased child of her mother, alleging that the 2000£ had become divisible into six parts, and that *Ann Chislett* was entitled to one, and the other petitioners to another of such parts; and praying that the Accountant-General might be ordered to pay one-sixth of the 2000£. to *Ann Chislett*, and another sixth to the other petitioners.

Mr. *Malins*, in support of the petition, asked for the necessary inquiries to shew that the petitioners were entitled to what they sought by their petition, and added that they were willing to bear the expense of those inquiries.

The *Vice-Chancellor* said that the testator's assets ought to bear that expense; and that it could not have been the intention of the legislature, when it passed the 10th and 11th Vict. c. 96, to throw a burden upon *cestui que trusts* which they were not, previously, sub-

1848.
 In the Matter of
 SHARPE'S
 TRUSTEES.
 8th May.

ject to; and, therefore, he should consult the *Lord Chancellor* before he made any order on the petition.

On this day, His Honor, addressing Mr. *Matins*, said:

I have conferred with the *Lord Chancellor* on the subject of the petition on which you appeared a few days ago.

It strikes me that a question may be raised whether the petitioners are not entitled to interest from the time when their shares ought to have been paid. There may be also a question whether they are not entitled to have their shares paid to them, free from the costs of the inquiries which are necessary to ascertain who are entitled to the fund. The object of the act was, merely, to relieve trustees. It never was the intention of the legislature to deprive the beneficial takers of those costs and expenses, which, before the passing of the act, would have been borne by the general assets of the testator.

The second section of the act gives this Court authority to make such order as may be right, and, also, to direct such suits to be instituted as may be required. And it strikes me that, in this case, the proper course is to make the order for a reference, without prejudice to the right of the petitioners to file a bill; and to reserve the question of costs.

I think also that the trustees ought to have notice of the order.

PRICE v. ANDERSON.

THE testator in the cause, by his will bearing date 14th of February 1838, gave to his daughter, *Elizabeth Mary Price*, during her life, the dividends or interest of 25,000*l.* 3*l.* per Cent. Reduced Annuities, and the dividends or interest of whatever stock he might possess in the Royal Exchange Assurance Company; and, after her death, he gave to his granddaughter, *Eliza Harriett Price*, during her life, the dividends or interest upon the aforesaid 25,000*l.* 3*l.* per Cent. Reduced Annuities, and also the interest or dividends on his Royal Exchange Assurance stock; and he declared it to be his will that the interest and dividends upon the aforesaid 25,000*l.* 3*l.* per Cent. Reduced Annuities and the interest or dividends on his Royal Exchange Assurance stock, should not be subject to the debts or control of any husband with whom his said granddaughter might intermarry, and that, if she should die leaving any child or children, such a part of the aforesaid dividends might be applied to the maintenance of such child or children, during their respective minorities, as might be thought proper, and, when the said child or children should have attained the age of twenty-one years, that the principal sum of 25,000*l.* 3*l.* per Cent. Reduced Annuities, and the principal of the Royal Exchange Assurance stock, should be sold or equally divided between such children, if more than one, but, if only one child, then the whole to be transferred to such only child; and, should his granddaughter die without leaving children, or, there being such, all of them should die before attaining the age of twenty-one years, then he gave to his daughter, *Elizabeth Mary Price*, the power of disposing

1847.
18th January.

Bonus.
Tenant for Life
and Remainder-
man.

Dividend.
Income or
Capital.

For several years prior to 1846, an assurance company declared half-yearly dividends of 2*l.* 10*s.* per cent. on their stock, but, in that year, they declared a half-yearly dividend of 12*l.* 10*s.* per cent. Held that a tenant for life of their stock was entitled to the whole amount of that dividend.

1847.
 PRICE
 v.
 ANDERSON.

of the 25,000 *l.* 3 *l.* per Cent. Reduced Annuities and the Royal Exchange Assurance stock, in such manner as, by her last will and testament, she might direct or appoint.

The testator died in May 1838. He had 1,643 *l.* Royal Exchange Assurance stock standing in his name at his death.

In pursuance of an order in the cause, part of 1,643 *l.* stock was sold, and the residue, which amounted to 1,470 *l.* 16 *s.* 2 *d.*, was transferred into the name of the Accountant-General in trust in the cause; and the *dividends* were ordered to be paid to *Elizabeth Mary Price* during her life.

The Royal Exchange Assurance Company was incorporated by royal charter; and, in exercise of the powers thereby vested in them, they declared dividends on their stock, at Midsummer and Christmas in every year; and bonuses on it, at one or other of those periods, but at intervals of two, three, or more years. In June 1846, at which time the usual half-yearly dividend was 2 *l.* 10 *s.* per cent., they resolved: "That a *dividend* of 12 *l.* 10 *s.* per cent. on the capital stock of the corporation, be made, among the proprietors, on the amounts of stock that stood in their respective names when the transfer-books were shut on the 2nd of June instant; and that warrants be issued for the same on Wednesday the 8th of July next."

In June 1840, the company declared a bonus on their stock. The resolution passed on that occasion was as follows: "Resolved that, *in addition to the ordinary dividend* of 2 *l.* 10 *s.* per cent. on the capital stock of the

corporation for half a year ending at Midsummer next, a distribution of 5*l.* per cent. *out of the accumulated profits* of the corporation, be made to the proprietors on the sums standing in their names respectively on the shutting of the transfer-books; and that warrants for the said dividend *and distribution* be issued on Thursday, the 9th of July next."

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PRICE
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ANDERSON.

In pursuance of the last-mentioned resolution, the sum of 73*l.* 10*s.* 9*d.* cash, was paid to the Accountant-General, in respect of the company's stock standing to the credit of the cause: and, thereupon, *Elizabeth Mary Price* petitioned to have that sum paid to her, as being entitled to the dividends and interest of the stock: but the *Vice-Chancellor of England*, (who heard the petition), said that, as the distribution of 5*l.* per cent. was not made *as dividend*, it must be considered as capital: and, accordingly, *he ordered the 73 l. 10 s. 9 d. to be laid out in the purchase of 3 l. per Cent. Reduced Bank Annuities, and the dividends to be paid to Elizabeth Mary Price, during her life.*

The sum of 183*l.* 17*s.* cash was paid to the Accountant-General, in pursuance of the resolution passed in June 1846: and, thereupon, *Elizabeth Mary Price* presented a petition in the cause, stating as above, and also that, as the Royal Exchange Assurance Company had declared the 183*l.* 17*s.* to be *a dividend*, and, as she was entitled, for her life, *to the dividends* of the stock standing to the credit of the cause, the 183*l.* 17*s.* *ought to be paid to her*: and the prayer of the petition was in accordance with that statement.

In the observations at the end of the brief, it was stated that, as the Royal Exchange Assurance Com-

1847.

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ANDERSON.

pany, was, like the Governor and Company of the Bank of England, incorporated by royal charter, the Accountant-General considered that the case was within the principle of an Order made, by Lord *Cottenham*, respecting bank-stock. That Order was as follows:—“Wednesday, the 4th day of April, 1838. I do hereby order that, in all cases in which application shall be made by any of the suitors of this Court entitled to half-yearly dividends of bank stock, the Accountant-General do, until further order, draw for $3\frac{1}{4}$ per cent., part of the last declared dividend of 4 per cent. now due on bank stock, save and except such causes wherein, by order of this Court, the dividends of bank-stock are directed to be laid out, and also in the causes mentioned in the schedule hereunder written, and such as may hereafter be directed, by order of this Court, to be inserted in the said schedule: in all which excepted cases, the Accountant-General shall, until further order of the Court, draw for 4 per cent. the amount of the last declared dividend.”

Mr. *James Parker* and Mr. *Hetherington*, in support of the petition, contended that the petitioner was entitled to the whole of the 183*l.* 17*s.* cash; for it was paid, not out of the capital, but out of the profits of the company, and was declared to be a dividend: *Ward v. Combe* (a), *Brander v. Brander* (b), *Paris v. Paris* (c), *Witts v. Steere* (d), and *Barclay v. Wainewright* (e): which last case, they said, was precisely in point.

Mr. *Eade*, for the testator's executor, said that, ever

(a) *Ante*, Vol. VII., p. 634.

(d) 13 Ves. 363.

(b) 4 Ves. 800.

(e) 14 Ves. 66.

(c) 10 Ves. 185.

In 1830, the half-yearly dividend on the assurance company's stock, had been 2*l.* 10*s.* per cent.: that, in the distribution was made in pursuance of the resolution of June 1840, the Court held that part of the amount was to be considered as dividend, and the remainder as capital: and that the Court ought to come to the same conclusion with respect to the distribution in question; for it was made up of the ordinary half-yearly dividend of 2*l.* 10*s.* per cent., and of a bonus or increase of capital, at the rate of 5*l.* per cent. He referred to Lord Cottenham's order of April 1838; and said that the assurance company, in directing the distribution in question, had deviated from their regular course, which they had no right to do; and that there was no magic in their phraseology.

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v.
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The VICE-CHANCELLOR:

This is a very plain case. The question must be determined by the mode in which the company have dealt with their profits.

The sum which the petitioner asks to have paid to him was taken out of the profits of the company, and, in each, it would, *prima facie*, belong to the petitioner as tenant for life of the stock in respect of which it was paid. Nevertheless, the company might have declared, they had thought proper so to do, that part of it should be dividend, and part capital. But, instead of doing so, they have declared the whole to be dividend; and, therefore, the tenant for life is entitled to the whole.

The Lord Chancellor's order applies only to the Governor and Company of the Bank of England, and not to any other company. Therefore, it manifests that,

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what other companies declare to be dividend, shall be taken as dividend.

If the testator in this case had intended that the tenant for life of his Royal Exchange Assurance stock, should not receive a greater dividend upon it than *5l per cent. per annum*, and that the rest should be considered as capital, he might have said so.

Order the costs of all parties to be taxed and paid out of the 183 *l. 17 s.*, and the balance to be paid to the petitioner.

MEMORANDA.

THE decision in *Wilson v. Wilson*, reported *ante*, Vol. XIV., p. 405, has been affirmed by the House of Lords.

After the case of *Mason v. Wakeman*, *ante*, p. 374, had been printed, Vol. II., Part III., of Mr. Phillips's Reports was published; from which it appears that the Lord Chancellor reversed the decision in that case.

LUDGATER v. CHANNELL.

was an administration-suit. The receiver who was appointed to collect the testator's outstanding, having died, a petition was presented by the parties, alleging that, at his death, a balance from him to the estate; and praying that the balance which he had entered into, might be put in against his real and personal representatives and his executor or that his personal representative might forthwith render the accounts of his receipts and payments in and out of the estate.

The facts of the case, are detailed in the judgment.

Underdon and Mr. *Parker* supported the petition. *See Littleboy v. Spooner (a)*, and *Creighton v. Littleboy (b)*.

Mr. *Cooper*, Mr. *Rolt*, Mr. *Tennant* and Mr. *Waley*, for the trustees and the representatives of the receiver, said, that it did not appear from the *Master's* report that any balance was due from the receiver, or, at all events, that the report did not state the amount of the balance; and, accordingly, that the Court had no jurisdiction to order, in any way, the personal representative of the receiver to render an account, but that a bill must be filed. *Jenkins v. Littleboy (c)*, *Bertie v. Lord Abingdon (d)*. They added that the order in *Littleboy v. Spooner* was made by consent (e).

Report on Decrees, 331. Cl. & Fin. 325. *See*, Vol. VII., p. 171. Beav. 53. g. Lib. B., 1825, fol. V.

1516. *Ann Burgess*, the receiver's administratrix, consented to the order, by Mr. *Ellison*, her counsel.

K K

1847:

29th and 30th January, and 10th February.

Receiver.
Jurisdiction.
Practice.

The Court will not allow a receiver's recognition to be put in suit, on a report shewing merely that something is due from the receiver. The precise amount of what is due, must be stated. The Court has no jurisdiction to order the personal representative of a receiver to account for the receiver's receipts, without a bill being filed.

1847.

LUDGATER
v.
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The VICE-CHANCELLOR :

What I intend to do is this: I will have the matter carefully examined into, whether it has been the practice of the Court to make an order of this kind, without its distinctly appearing, by the report of the *Master*, in proceedings to which the receiver was a party, what was the balance actually due; for that is, in fact, the only question before me.

The matter stands thus: Two reports only have been made, on the receiver's accounts, upon proceedings in the *Master's* office to which the receiver was or might have been a party. The first report was made on the 6th of August 1841; and, there, the *Master* states that, in pursuance of the order appointing a receiver, he had been attended by the solicitor for the Plaintiffs and the Defendants, and by the agent of *W. Lancaster*, the receiver. And then he states that the receiver had caused to be laid before him, an account of his receipts respecting the outstanding estate which he was to collect; and that it appeared, therefrom, that the personal estate to an extent of upwards of 13,000 *l.*, had been collected and got in by the receiver, and that there was a balance of 9000 *l.* and upwards due from him in respect thereof; and, as some time might elapse before the accounts could be finally settled and passed, the *Master* appointed him to pay in a sum of 7000 *l.* before a certain time. It appears, by a statement on this petition, that that sum was paid in on the 10th of August 1841. Then the next report, (in fact, the only other report respecting the receivership,) is dated the 22nd of November 1842; and, there, the *Master*, after taking notice of the former proceedings and of the direction to pay the sum of 7000 *l.*, goes on to say that, *it being represented to him* that other sums of money, since the 6th of August 1841, had been col-

lected and got in by the receiver, in respect of the personal estate, and that a balance, exceeding 6000 *l.*, then remained due on account thereof, he had appointed the receiver to pay the sum of 6000 *l.* into the Bank within seven days from the date of his report. The precise day on which that sum was paid in does not appear on the petition; but it does appear on the petition, that it was paid in within the seven days, according to the direction of the *Master*.

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LUDGATER
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CHANNELL.

Now, it is very remarkable that the *Master* does not state that he has exercised his judgment on any subsequent accounts; but he states that *it had been represented to him* that other sums had been received, and that a balance was left exceeding 6000 *l.*, which still remained due; and, therefore, he orders the receiver to pay in such a sum. But I think that the fair inference to be drawn from that, is that the *Master* came to the conclusion that a balance would remain in the receiver's hands after the payment of the 6000 *l.* That is the whole of the case, at present, against the receiver.

Then the question is, whether it is the practice of the Court to direct the recognizance to be estreated, where no report has been made that something *definite* is due: for one cannot help observing that it would be true that something was due, if only five shillings were due. And I shall have the most careful inquiry made, whether it is the practice of the court to order the recognizance to be estreated, where it does not appear by the *Master's* report that any *definite* sum is due—because, if the recognizance were ordered to be estreated in the first instance, the consequence would be, that an attempt would be made to take the receiver's accounts in a court of law, (which, I apprehend, this Court would not allow; be-

1847.

LUDGATER
v.
CHANNELL.

cause this Court never allows a court of common law to interfere with its jurisdiction over its own officers), or the consequence would be that the cognizee might (if I may use the expression) help himself *ad libitum**; which would be contrary to justice. Therefore, it seems to me that there is some difficulty in principle, in making such an order as is asked by this petition, under the circumstances of the case. But, if it has been the practice to do so, I must be bound by the practice.

All that I can do at present, is to direct the practice to be inquired into, and that the petition do stand over in the meantime.

The VICE-CHANCELLOR:

10th February. In this case, the petition, after stating a great number of circumstances, asks that the petitioners may be at liberty to put the recognizance into execution against *Mary Lancaster*, as the administratrix of the late *W. Lancaster*, or that she may be decreed to pass the accounts.

Now, it was said that a petition in this form, was not authorised by the practice of the Court. I therefore wrote to Mr. *Wood*†, and he has sent me this statement. He says: "With regard to the question whether it has been the practice of the Court to order a receiver's recognizance to be put in suit where it does not appear, from the *Master's* report, that a definite sum is due, the registrars know of no case, nor can they find

* In every receiver's recognizance, the cognizee is either the Master of the Rolls or the senior Master in Chancery.

† One of the registrars of the Court.

one, in which the recognizance has been put in suit against the sureties, in default of the receiver paying what may be due from him, without the amount being first ascertained, except where the receiver has absconded; and they conceive that a breach of the recognizance by non-payment of a balance reported due from a receiver, ought to be shewn as a ground for granting an application for liberty to put the recognizance in suit; which opinion also prevails in the Petty-Bag Office, where these proceedings are instituted; as no case is found to the contrary; and such is also the practice in lunacy." This appears to me to be conclusive upon the question.

1847.
LUDGATER
v.
CHANNELL.

With respect to the point, which was rather faintly urged, as to decreeing an account against the administratrix, I have read over, very carefully, the order which was made in *Littleboy v. Spooner*, and it appears that the order was made with the consent of the administratrix's counsel. In *Mead v. Lord Orrery*(f) it does not appear that the question before me, arose; but it seems that Lord *Hardwicke* made the order, on the presumption that there was no such question.

I think, therefore, the petition must be dismissed with costs.

(f) 3 Atk. 235.

1847:
22nd January.

*Stat. 3 & 4
Will. 4, c. 104.
Real Estates.
Assets.
Jurisdiction.*

The Court has jurisdiction to order the real estates of a deceased debtor to be sold for payment of his debts in a suit for the administration of his estate, though it be instituted not by a creditor, but by the heir and the next of kin of the deceased.

PRICE v. PRICE.

THE question in this case was whether, under the 3 & 4 Will. 4, c. 104, for making real estates assets for payment of debts, the Court could order the real estates of an intestate to be sold for payment of his debts, in a suit instituted not by a creditor, but by the eldest son and heir, and the other children of the intestate (all of whom were infants), for the administration of his estate.

Mr. *Whatley*, for the Plaintiff, cited *Dinning v. Henderson* (a).

Mr. *Borrett*, for the Defendants.

The VICE-CHANCELLOR:

It appears that the personal estate of the intestate is insufficient to pay his debts, and the question is, whether the Court has jurisdiction under 3 & 4 Will. 4, c. 104, to order the deficiency to be raised by sale of his real estates, in a suit not instituted by a creditor of the deceased.

The act says that, when any person shall die seised of any lands which he shall not, by his last will, have charged with or devised subject to the payment of his debts, the same shall be assets, to be administered in courts of equity, for the payment of the just debts of such person, as well debts due on simple contract as on specialty. That gives the Court jurisdiction in this case.

Then it says that the heir or devisee of such debtor, shall be liable to all the same suits in equity at the suit of any of the creditors of such debtor, as the heir or devisee of any person who died seised of freehold estates was, before the passing of the act, liable to, in respect of such freehold estates, at the suit of creditors by specialty in which the heirs were bound. But it was unnecessary to add that, after the act had declared that the real estates of the debtor should be assets to be administered in courts of equity for the payment of his debts.

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PRICE
v.
PRICE.

JOHNSON v. TUCKER.

THE bill was filed by one of the *cestuis que trust* under will, against the other *cestuis que trust*, the heir of the surviving trustee, and two persons named *Tucker* and *Forward*, who had been in receipt of the rents of the testator's estates since the death of the surviving trustee. It prayed that the will might be established and the trusts of it performed; that an account might be taken of the rents received by *Tucker* and *Forward*; that new trustees might be appointed, and that the estates might be conveyed to them by the heir of the surviving trustee.

The *cestuis que trust* who were made Defendants, having been served with a copy of the bill under the 23rd

1847:
1st February.

New Orders.
Practice.
Service of Copy
of Bill.

All the trustees named in a will having died, a bill was filed by one of the *cestuis que trust* against the others, the heir of the trustee who died last, and certain persons who had been in

possession of the estates, praying for an account of the rents received by those persons, for the appointment of new trustees, and that the estates might be conveyed to them by the heir of the trustee who died last.

Held that the *cestuis que trust* who were Defendants, had been rightly served with a copy of the bill under the 23rd General Order of August, 1841.

1847.

JOHNSON

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General Order of August, 1841 (*a*), it was objected, on the hearing of a motion on behalf of the Plaintiff for the production of documents in the possession of *Tucker* and *Forward*, that those *cestuis que trust* ought to have been served with a subpoena in the usual way; because a conveyance was prayed as against them.

THE VICE-CHANCELLOR:

It seems to me that the 23rd Order is applicable to a case like this; for nothing is asked adversely to those Defendants who have been served with a copy of the bill; but every thing that is asked is for their benefit. Therefore, the motion must proceed.

Mr. *James Parker* and Mr. *Glasse*, for the Plaintiff, cited *Davis v. Davis* (*b*), and *Lloyd v. Lloyd* (*c*).

Mr. *Bethell*, Mr. *Stuart*, and Mr. *Rogers*, for *Tucker* and *Forward*, cited *Barkley v. Lord Reay* (*d*), and *Marke v. Locke* (*e*)

(*a*) See Beavan's Orders, 171.

(*b*) 4 Hare, 389.

(*c*) 1 Youn. & Coll. C. C. 181.

(*d*) 2 Hare, 306. See 309.

(*e*) 2 Youn. & Coll. C. C.

500.

WRIGHT HENNIKER WILSON, WM.
R FOSTER, and N. WETHERELL, v.
N WRIGHT HENNIKER WILSON.

1847:
26th and 30th
January.

hearing of this cause and of the cross-cause, is
ante, Vol. XIV., p. 405.

Practice.

Decree.

*Evidence in the
Master's Office.*

the decree then made, and which the House of
affirmed, it was referred to the *Master* to settle
prove of a proper deed of conveyance for the
of carrying into effect the articles of separa-
the 1st of June 1843; and the *Master* was di-
o insert, in such deed, a joint and several cove-
Nathan Wetherell and William Carr Foster,
John Wright Henniker Wilson, to indemnify him
all the debts and liabilities of *Mary Wright Hen-*
ilson, which existed on the 1st of June 1843, and
subsequent and future debts and liabilities; and
in the cross suit was dismissed with costs.

On a reference
to the *Master*
under a decree,
all the evidence
referred to in
the decree
is before the
Master. There-
fore, a party
who objects to
the draft of the
Master's report,
on the ground
that it is not
warranted by
the evidence, is
not bound to
produce office
copies of the
depositions;

the 5th of August 1846, the *Master*, Mr. Senior,

but he ought, previously, to notify to the *Master* what parts of
the evidence he intends to rely upon.

Articles of Separation.—Construction.—Repugnancy.

Articles of separation between *John Wright Henniker Wilson*
and *Mary Wright Henniker Wilson*, his wife, provided that all
the rents, taxes, and other outgoings in respect of certain estates,
which were originally the property of the latter, should be paid by
the former up to a day named, and that, after that day, they should
be paid by *Mary Wright Henniker Wilson*, and that *John Wright*
Henniker Wilson should be indemnified therefrom, and from all the
present debts and liabilities of the said *John Wright Henniker*
Wilson.

Held that, as the words in italics made the clause inconsistent
with and repugnant to itself, they ought to be disregarded.

1847.

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reported that he had settled the draft of a proper deed of conveyance for the purpose of carrying the articles of separation into effect, and had inserted therein a joint and several covenant by the Plaintiffs, *Wetherell* and *Foster*, to indemnify the Defendant, *John Wright Henniker Wilson*, against all the debts and liabilities of the Plaintiff, *Mary Wright Henniker Wilson*, which existed on the 1st of June 1843, and all her subsequent and future debts and liabilities.

The Plaintiffs took four exceptions to the report. The first alleged, generally, that the draft was not a *proper deed* (draft of a proper deed—*qu.?*) for carrying the articles into effect. The second, that the *Master* ought not to have inserted in the draft, as he had done, a covenant by *Foster* and *Wetherell*, with Mr. *Wilson*, to indemnify him from all the debts and liabilities to which he was subject on the 2nd* of June 1843. The third, that the *Master* had not stated in his report that, on the settling of the draft, the Plaintiffs read, or proposed to read before him, with reference to the draft of a proper deed, the depositions, admissions and exhibits in the cause which the exception specified, and which were entered in the decree. The fourth exception was that, though the Plaintiffs tendered and proposed to read in evidence before the *Master*, on his proceeding to settle the draft, the depositions, admissions and exhibits mentioned in the third exception, the *Master* rejected or did not receive the same.

* *Sic.*

Mr. *Bethell* and Mr. *Lloyd*, in support of the third and fourth exceptions :

The Plaintiffs left in the *Master's* office a copy of the depositions which had been printed for the purpose of

being used on the appeal to the House of Lords, and took out a warrant on leaving it. After that, a warrant was taken out to prepare the report. Then the Plaintiffs took out a warrant to review the report; because the *Master* had inserted in the draft, improperly as they thought, a covenant, by *Foster* and *Wetherell*, to indemnify Mr. *Wilson* against *his own* debts. When the *Master* was attended on that warrant, the Plaintiffs' counsel proposed to read the printed copy of the depositions, but the Defendants' counsel objected to its being read, because it was not an office copy; and the *Master* allowed the objection. The consequence was that our evidence was wholly excluded; for it was then too late for us to bring in office copies of the depositions (a). We contend, however, that it was not necessary for us to do so; for a party who carries a decree into the *Master's* office, virtually carries in all the evidence on which it is founded; and (as Lord *Cottenham* held in a case that came before him a few years ago) (b), nothing further is required of him except to give the *Master* notice of the evidence which he means to make use of; which we did, by leaving the printed copy of the depositions in the *Master's* office. Therefore, we submit that the *Master* ought to have allowed us to read the evidence, especially in a case where the question before him, was what was the true intent and meaning of the parties to an executory instrument.

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WILSON.

Mr. *James Parker* and Mr. *Busk*, in support of the report, said that the *Master* was justified in rejecting

(a) See 67th General Order of April 1828; Beavan's Ord. 26. was not mentioned; but the 65th General Order of April 1828, (Beav. Ord. 26), was

(b) The name of the case referred to.

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the evidence; for, first, it was not tendered either at the proper time or in the proper form; and, secondly, that it related to a question which was not before the *Master*, but had been decided by the Court at the hearing of the cause, namely, whether there was a clerical error in the articles of separation.

The *Vice-Chancellor*.—Before I decide on these exceptions, I will ascertain from the *Master* what actually took place in his office.

The VICE-CHANCELLOR :

30th January.

I have had an interview with *Master Senior*, and he stated to me that what took place in his office with regard to these exceptions, was that the depositions which had been printed in the appendix to the case for the House of Lords, were left in his office on the 10th of June, and a warrant was taken out on leaving them. There was no dispute, as to that evidence, upon that warrant. Afterwards, two other warrants were taken out; one to prepare and the other to review the report. When the *Master* was attended under those warrants, the counsel for the Plaintiffs proposed to read the printed depositions; but the counsel for the Defendants objected that no evidence had been left, because nothing could be evidence except the office copies of the depositions; and the *Master* allowed the objection.

I cannot but think that, in so doing, the *Master* adhered to mere form, and disregarded the substantial justice of the case.

The object of the Plaintiffs' counsel was to procure the omission of a covenant in the draft which the *Master* had settled and approved of, on the ground that the

clause on which that covenant was founded, had been inserted in the articles under such circumstances that it ought not to be regarded; and the evidence was tendered for the purpose of shewing what those circumstances were.

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I do not now recollect the whole of the evidence; but, as it formed part of the decree, and as the leaving of the printed depositions was a sufficient notification, to the *Master*, of the evidence which the Plaintiffs intended to rely upon, I think that the *Master* ought not to have rejected it.

Consequently, I shall allow the third and fourth exceptions.

Mr. *Bethell* and Mr. *Lloyd*, in support of the first and second exceptions:

At the hearing of the cause your Honor decided that the alleged error in the seventh clause of the articles of separation, was not a *clerical* error; but you decided nothing as to the construction which ought to be put upon that clause. That question, therefore, remains entirely open.

The instrument under consideration, is executory; and, therefore, the Court will put a more liberal construction upon the language of it, than it would on the language of an executed instrument. But, if it had been an instrument of the latter description, the evidence, both intrinsic and extrinsic, is so strongly in favour of what we contend for, namely, that the word,

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'John' in the seventh clause, was inserted, by mistake, for, 'Mary,' that the Court would correct the mistake.

We will first consider the seventh clause, without having regard to any of the other clauses. It provides that, so long as *John Wright Henniker Wilson* shall observe and perform the covenants and agreements contained in the articles, all the rents, taxes and other outgoings of the estates therein mentioned (all of which were the property of his wife, *Mary Wright Henniker Wilson*) shall, after the 24th of June, be paid by *Mary Wright Henniker Wilson* during her life, and that *John Wright Henniker Wilson* shall be indemnified therefrom and from all the present debts and liabilities of the said *John Wright Henniker Wilson*, by the covenant of *Foster and Wetherell*. Now it is correct to use the word, 'indemnified,' with reference to the debts and liabilities of a third person, but it is quite incorrect to use that word with reference to the debts and liabilities of the person with whom the covenant is entered into. If, however, we substitute, 'Mary' for, 'John,' the word, 'indemnified,' will be used correctly, in both parts of the clause.

We will now consider the same clause with reference to the one which immediately precedes it, namely, the sixth. That clause stipulates that all rents, taxes and other outgoings with respect to the freehold, copyhold and leasehold estates, and all the lessee's covenants in respect of the leasehold estates, that is to say, that certain existing debts and liabilities of *John Wright Henniker Wilson*, shall be performed and satisfied by him. But, when we look at the seventh clause, we find that *John Wright Henniker Wilson*, is to be indemnified against *all* his debts and liabilities: so that the latter clause is, evidently, inconsistent with the former. If,

however, we read, '*Mary*' for, '*John*,' the inconsistency will be wholly removed.

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The learned counsel next contended that the *Master*, in settling the draft which was the subject of the exceptions, ought to have had regard to the evidence in the cause, though it was extrinsic to the articles; and that they were entitled to use it in support of their exceptions. They then read that part of the evidence which related to the negotiations which took place between the parties and their solicitors before the articles were executed: from which it appeared that Mr. *Wilson* had never stipulated that any provision should be made with respect to his debts, or for anything more than that an annuity of 1000*l.* a year should be secured to him.

The authorities referred to, were *Sumner v. Powell* (c), *Vernon v. Alsop* (d), *Waugh v. Russell* (e), *Coles v. Hulme* (f), *Kentish v. Newman* (g), *Hewet v. Ireland* (h), *Uvedale v. Halfpenny* (i), *Tollett v. Tollett* (k), *Brackenburg v. Brackenburg* (l), *Philipps v. Chamberlaine* (m), *Bushell v. Bushell* (n), *Morse v. Lord Ormonde* (o), *Newburgh v. Newburgh* (p), *Bengough v. Edridge* (q), *Strong v. Teatt* (r), *Coryton v. Helyar* (s), 1 Saunder's Rep. 320 b,

(c) 2 Mer. 30.

(d) 1 Lev. 77.

(e) 5 Taunt. 707.

(f) 8 Barn. & Cres. 568.

(g) 1 P. W. 234.

(h) Ibid. 426.

(i) 2 P. W. 151.

(k) Amb. 177.

(l) 2 Eden, 275.

(m) 4 Ves. 51.

(n) 1 Scho. & Lef. 90.

(o) 5 Madd. 99; and 1 Russ. 382.

(p) 5 Madd. 364. See Phill. on Ev., last edit., 725.

(q) *Ante*, Vol. I., page 173. See 257.

(r) 2 Burr. 910.

(s) 2 Cox, 340.

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note ; *The Attorney-General v. Shore* (t), *Blundell v. Gladstone* (u), *Youde v. Jones* (x).

Mr. *James Parker*, Mr. *Busk* and Mr. *Henniker*, in support of the report, said that, in the cases cited in favour of the admissibility of extrinsic evidence, there was some ambiguity in the language of the instruments which the Court was called upon to construe ; but, there was no ambiguity whatever in the clause of the articles now under consideration, and that the Court had decided that there was no mistake in that clause.

The *Vice-Chancellor*.—What I decided was that there was no *clerical* error in the clause, and that there ought to be a specific performance of the articles. I purposely abstained from putting a construction on any part of the articles : the question now is, how they ought to be performed. I pay no regard, whatever, to the parol evidence. The question is whether a deed which is repugnant to itself—which provides, first, that a party shall pay certain debts and be subject to certain liabilities, and, afterwards, that he shall be indemnified from those debts and liabilities, ought to be held, by this Court, to be a proper deed.

Mr. *Lloyd* replied.

THE VICE-CHANCELLOR :

As far as I recollect I purposely abstained from expressing any opinion on the construction of the articles of separation, but I directed that the deed to be settled

(t) 9 Cl. & Fin. 355.

(x) *Ante*, Vol. XIV., page

(u) *Ante*, Vol. XI., page 131.

and approved of by the *Master*, should contain a covenant, by the trustees, to indemnify Mr. *Wilson* against his wife's debts: and the draft which the *Master* has settled and approved of, does contain such a covenant.

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No one can look at these articles of separation, as they now stand, with the provisions in them as to the division of the lady's fortune, the taking back a certain part of her property and giving the husband 1000*l.* a year, without being struck with the fact that, after the sixth clause had stipulated that all rents, taxes, &c. up to a certain time, should be paid by *John Wright Henniker Wilson*, a clause should follow in this form: "That, if and so long as the said *John Wright Henniker Wilson* shall duly observe and perform the covenants and agreements herein contained, all the rents, taxes, rates, tithes and other outgoings in respect of the said several estates respectively, and also all expenses of common and ordinary repairs and insurance of or upon the same, and all the lessee's covenants in respect of the said leasehold estate respectively, shall, from and after the said 24th day of June instant, be duly paid, performed and satisfied by the said *Mary Wright Henniker Wilson*, during her life; and he, the said *John Wright Henniker Wilson*, his heirs, executors and administrators, and his and their estates and effects, shall be indemnified therefrom and from all the present debts and liabilities of the said *John Wright Henniker Wilson*." Any one would think that, unless there were a predetermination to be verbose, no person would have constructed a sentence in the way in which this is constructed: because, having got the antecedent: "And that he, the said *John Wright Henniker Wilson*, his heirs, executors and administrators and his and their estates and effects, shall be indemnified therefrom," if it had been meant to say that he should

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be indemnified also from his present debts and liabilities, the following words would have naturally flowed from the pen: "and from all *his* present debts and liabilities." Instead of which these words are used: "and from all the present debts and liabilities of the said *John Wright Henniker Wilson*:" so that Mr. *Wilson*'s name is unnecessarily repeated. In addition to which we find that it was the express agreement of the parties, (and the instrument settled by the *Master* provides,) that, as to some of his present debts and liabilities, Mr. *Wilson* should not be indemnified, but should discharge them himself. Therefore, the clause, as it now stands, is contradictory and repugnant to the one which immediately precedes it. But those clauses will be made consistent with each other, if the words: "and from all the present debts and liabilities of the said *John Wright Henniker Wilson*," are omitted. Therefore, I think that the proper mode of dealing with those words, is to strike them out; and, consequently, I shall allow the first and second exceptions.

The Defendant also took exceptions to the report. The first insisted that the following covenant in the draft settled by the *Master*, ought to be struck out of it: "Now this indenture witnesseth that, in obedience to the said recited decree, and in pursuance of the said recited agreement on the part of the said *John Wright Henniker Wilson*, and in consideration of the premises, and also in consideration of the provisions hereinafter contained and of the covenants hereinafter contained on the part of the said *Nathan Wetherell* and *William Carr Foster*, he the said *John Wright Henniker Wilson*, for himself, his heirs, executors and administrators, doth hereby covenant with the said *Nathan We*

therell and *William Carr Foster*, their executors and administrators, that it shall be lawful for the said *Mary Wright Henniker Wilson*, at all times hereafter, to live separate and apart from him the said *John Wright Henniker Wilson*, in such and the same manner, in all respects, as if she were sole and unmarried, and that he the said *John Wright Henniker Wilson* will not, at any time hereafter, compel or endeavour to compel the said *Mary Wright Henniker Wilson* to cohabit or live with him by any ecclesiastical censures or proceedings, or otherwise howsoever, or, in any manner, assume, claim or exercise any authority, control or restraint over or upon the said *Mary Wright Henniker Wilson*, or, either directly or indirectly, disturb, interrupt or interfere with the said *Mary Wright Henniker Wilson* in her way of living, or in her liberty or freedom of going to and residing at such place or places as she shall think fit, or in the management of her estate or property, or otherwise molest or trouble her in any manner whatsoever, or sue or prosecute any person or persons for receiving, harbouring, protecting or assisting her, and will not, at any time hereafter, without her express consent in writing first had and obtained, visit her the said *Mary Wright Henniker Wilson*, or, during her life, visit or go to the said capital, messuage or mansion at *Chelsea Park* aforesaid, or any other mansion or dwelling-house of the said *Mary Wright Henniker Wilson* while in her occupation, (whether she the said *Mary Wright Henniker Wilson* shall, at the time, be or shall not be resident thereat,) on any account or pretence whatsoever."

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The Defendant's second exception insisted that, if the above covenant ought not to be struck out, it ought to be altered and made to correspond with the terms of the first clause in the articles of separation. That clause

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provided that Mr. *Wilson* should, at all times thereafter, permit Mrs. *Wilson* to live separate and apart from him, at such place and in such manner as she should think fit, as if she were unmarried, without any molestation, interference or annoyance whatsoever by him or on his part.

Mr. *James Parker* and Mr. *Busk* said that neither an action at law nor a suit in equity could be maintained upon the covenant mentioned in the first exception, and that many of the provisions of it were illegal; that a court of equity never enforced a covenant, between a husband and wife, to live separate from each other, but only dealt with their property; and, accordingly, the decree in this cause directed the *Master* merely to settle a proper deed of *conveyance* for carrying the articles into effect; that, at all events, the *Master* was not justified in expanding the first clause in the articles in the way that he had done: 2 Roper on Hus. and Wife, Jacob's edit. p. 270, and notes thereon; 2 Madd. Prin. and Prac., 3rd ed. p. 496, note (c), *Augier v. Augier* (y), *Frampton v. Frampton* (z), *Warrender v. Warrender* (a). They added that Reg. Lib. had been searched for the case in which Lord *Bathurst* was said to have granted an injunction to restrain a husband from suing for a restitution of conjugal rights (b), but that no such case could be found.

Mr. *Bethell* and Mr. *Lloyd* cited *King v. Mead* (c), *Norton v. Seton* (d), *Briggs v. Morgan* (e).

The VICE-CHANCELLOR:

I am now hearing exceptions to the *Master's* report

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|---------------------------------------|---------------------------|
| (y) Prec. Ch. 496. | (c) 1 Burr. 542. |
| (z) 4 Beav. 287. See 293. | (d) 3 Phillim. Eccl. Rep. |
| (a) 2 Cl. & Fin. 488. | 147. |
| (b) See Jacob's Rep. 139,
and 140. | (e) Ibid. 325. |

made in pursuance of a decree, and I am bound by the decree. When the House of Lords has reversed or altered it, I shall be bound by the decision of the House of Lords.

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WILSON.

I think that the exceptions ought to be overruled; because the Court has directed that it shall be referred, to the *Master*, to settle a proper deed of conveyance for the purpose of carrying the articles of separation into effect, and it is observable that those articles provide that certain estates which originally belonged to Mrs. *Wilson*, shall be conveyed in a certain manner; and, with respect to the *Chelsea Park* estate, that, from and after the 24th of June then instant, it shall be held by and vested in trustees in trust for Mrs. *Wilson*, for her separate use. The articles also provide that Mr. *Wilson* shall be paid an annuity so long as he observes and performs the covenants and agreements therein contained. If the deed is to be framed according to the direction of the decree (which has regard to the articles, and, of course, to the ninth clause in them), it is quite obvious that stipulations tantamount to those which are contained in the articles, must be introduced into it, and that an expansion of the general meaning, unless it is carried beyond proper limits so as to be excessive, is quite unobjectionable. It was said that Mr. *Wilson* ought not to be prevented from going to the house at *Chelsea Park*; but that house would not be for Mrs. *Wilson's* separate use, if her husband had liberty to go to it.

Though it may be true that an action at law could not be maintained upon the covenant, yet, as the parties have stipulated that the payment of the husband's annuity shall depend upon his performing the covenants

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contained in the articles, those covenants must be inserted in the deed, in order that it may appear whether the payment of the annuity ought or ought not to be continued. However, I am by no means certain that an action could not be maintained on the covenant, for there has been a gradual change of opinion with respect to articles of separation. And Lord *Eldon*, notwithstanding his zeal to maintain the rigour of old principles, says, in *Lord Westmeath v. Lady Westmeath*:—"The conclusion I come to, is that, though I might have decided differently if I had been one of the common-law judges formerly, yet it is impossible for me now to take upon myself to say that these deeds are not good at law." Therefore, I shall overrule the two first exceptions.

Another of the Defendant's exceptions was that the draft settled by the *Master*, contained no provision for determining or putting an end to the conveyance, *covenants, and stipulations* therein contained, in the event of Mr. and Mrs. *Wilson*, at any time thereafter, cohabiting together.

The VICE-CHANCELLOR considered that, though the draft ought to have contained a provision for divesting the trustees of the legal estate in the hereditaments intended to be conveyed to them, it was not necessary for it to contain any provision for determining the covenants and stipulations; for a subsequent reconciliation between Mr. and Mrs. *Wilson* would, of itself, put an end to *them*: therefore the exception covered too much, and must be overruled.

The *Vice-Chancellor's* order on the exceptions, ~~was~~ affirmed by the *Lord Chancellor*.

RICHARDS v. PATTESON.

THE testator in the cause, by a codicil to his will, bequeathed, to his wife and another person, all his property in the *Austrian* and *Russian* funds: "and also that vested in a *Swedish* mortgage security." At the date of the codicil, he had *several Swedish* mortgages.

On the cause coming on to be heard for further directions,

Mr. *Bacon* and Mr. *Speed*, for the residuary legatees, contended that the words of the bequest were not sufficient to include all the *Swedish* securities; and that, as no particular security was mentioned, the bequest was void for uncertainty.

Mr. *James Parker*, Mr. *Calvert*, and Mr. *Chapman*, appeared for the other parties.

The VICE-CHANCELLOR said that the words on which the question arose, were equivalent to: "all my property vested in *Swedish* mortgage security," and, therefore, the bequest was not void for uncertainty; but all the testator's property invested on *Swedish* mortgages, passed by it.

1847:
10th February.

Will.
Construction.
Uncertainty.

Testator bequeathed all his property in the *Austrian* and *Russian* funds, and also that vested in a *Swedish* mortgage-security. The testator, at the date of his will, had several sums invested on different *Swedish* mortgages. Held that the bequest was not void for uncertainty, but that all the sums invested on *Swedish* mortgages, passed by it.

1848:

17th July.

*Legacy-duty.**Probate-duty.*

A. made a mortgage in fee to secure a sum lent to him by the trustees of his marriage settlement. On his death, his daughter became entitled to the equity of redemption of the mortgaged estate, as his heir, and, under his marriage settlement, to the mortgage-money. The trustees then conveyed the estate to her subject, expressly, to the equity of redemption, and did not release her father's covenant for repayment of the money. Afterwards she granted an annuity to M., and, as a security for it, conveyed the estate and assigned the money to a trustee for him. By her will she devised the estate, but did not dispose of her personal estate. Held that the money was subject to probate and legacy-duty.

SWABEY v. SWABEY.

A REPORT of the hearing of this cause for further directions, is given *antè*, page 106. A petition in the cause, presented by the Plaintiff, *Henry Swabey*, and the Defendant, *Maurice C. M. Swabey*, now came on to be heard. It appeared that the indentures of the 25th of March 1823, and 18th of February 1829, contained covenants, by *Thomas Lynch Goleborn* with *Maurice Swabey* and *T. H. Mortimer*, to re-transfer to them, the 2328 *l.* 17 *s.* 10 *d.* Consols, and 2735 *l.* 18 *s.* Reduced Annuities, upon the trusts of the settlement made on the marriage of *T. L. Goleborn* and *Catherine* his wife; and that the deed of the 16th of December 1841 recited those indentures and the indentures of the 21st and 23rd of December 1839 (*antè*, page 112), and recited, also, that the testatrix, *Catherine Goleborn*, had, for some time past, been in possession, "as such mortgagee as aforesaid," of the premises on which the two sums of stock were secured. But the petition, and the affidavit in support of it, alleged that the testatrix, when speaking of those premises, always spoke of them as her own absolute property, and not as property vested in her as mortgagee or by way of security only.

The question raised by the petition, was whether the two sums of stock were subject to probate and legacy duty.

: *James Parker* and *Mr. G. L. Russell*, for the p-
ers, relied on the *Vice-Chancellor's* judgment on the
ing of the cause for further directions, and on the
ration in the order then made. They also referred
Stley v. Milles (a), and added that the testatrix's
object in keeping the securities for the two sums of
on foot, was to keep her own property separate
her father's, in order that it might not be claimed
s creditors; that she always spoke of the houses as
wn absolute property; and that her will shewed
she considered them as such. [The *Vice-Chan-*
.—The question when the cause was before me for
r directions, was different from the present. How
t happen that the trustees did not release the fa-
covenant when they made the conveyance of *De-*
er 1839?] Probably it was overlooked.

1848.
—
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e *Solicitor-General* and *Mr. Maule* appeared for
rown, but

e VICE-CHANCELLOR, without hearing them, pro-
ced judgment as follows:—

think that this is a perfectly clear case.

hen the first sum of stock was advanced upon
security of the 25th of March 1823, the father
anted, with the trustees, to re-transfer what was
nced to him; and, when the second sum was ad-
ed, on the 18th of February 1829, he covenanted
the trustees to re-transfer that second sum. Then,

(a) *Ante*, Vol. I., page 298.

1848.

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when the trustees made the release of December 1839*, they released only the estate, and not the covenants to re-transfer. It is plain, therefore, that, after the execution of that deed, the debt remained, though the security by real estate was gone. When the instrument of the 16th of December 1841, was made, there was a recital that these very sums of stock belonged to the trustees of the settlement, so as to shew that the trustees were trustees for Miss *Goleborn*: and, when you come to the witnessing part of the deed, you find that she assigned the trust stock as part security for the annuity thereby granted by her. Two years afterwards she died.

I certainly was of opinion, and am so still, that, as between her devisee and her next of kin, her next of kin had no claim to the stock. But, at the time when she died, she was *cestui que trust* of the covenants, entered into by her father, to re-transfer the stock. Therefore the debt remained, and duty is payable on the stock to the Crown.

* See *ante*, p. 112.

JOHN ARMINE MORRIS *v.* SIR JOHN
MORRIS, BART.

1847.
12th and 13th
February.

IN June 1819, Sir *John Morris*, the grandfather of the Plaintiff and the father of the Defendant, settled the barony of *Sketty* in *Glamorganshire*, and all his other estates, on himself for life, with remainder to the use of trustees for 1000 years, upon certain trusts thereafter declared, and, subject to that term, *to the use* of the same trustees during the life of the Defendant without impeachment of waste, (provided the same should be committed or suffered with the privity and assent of the Defendant,) upon trust to preserve the contingent remainders thereafter limited, and to permit the Defendant to receive the rents of the estates, during his life, with remainder to the use of the Plaintiff, during his life, without impeachment of waste, with remainders to the use of the Plaintiff's first and other sons successively in tail male, with remainder to the use of himself in fee: and he reserved to himself and gave to the Defendant and the Plaintiff, when they should be in possession or in receipt of the rents of the estates, power to grant building leases.

*Equitable
Waste.*

*Tenant for Life
and Remainder-
man.*

Timber.

Ornamental
timber protect-
ed, though the
mansion-house
had been pulled
down, and the
bill did not
complain of
that act.

Sir *John* died soon after the date of the settlement. The Defendant then entered into possession of the estates, and, whilst the Plaintiff was an infant, pulled down the mansion-house thereon. Some years after the Plaintiff had attained twenty-one, the Defendant felled some and marked for felling other trees which his father had either planted or left standing and growing for the ornament or shelter of the house, in the lawns, gardens and pleasure-grounds belonging to it. Where-

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v.

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upon the bill was filed to restrain the Defendant from felling any more of the trees.

The affidavits in support of the bill, stated that the Plaintiff was only eight or nine years old when the Defendant pulled down the house, and that, as soon as he was old enough to form an opinion on the act, he disapproved of it, but abstained from expressing his disapproval, because he was dependant on his father; that the site of the house was very healthy, and the land about it very suitable for building purposes; and that none of the trees which the Defendant had felled or marked for felling, were blighted or stunted, but all of them were healthy and sound and very ornamental; and that, if any further cutting were allowed, the property would be greatly deteriorated in its building and agricultural value.

The Defendant's affidavit stated that his father erected the mansion-house mentioned in the bill, in or about the year 1770, and, not having land sufficient to form a lawn and pleasure-grounds, took a lease of about thirty-six acres, which were not comprised in the settlement but had become absolutely vested in the Defendant: that though the land on which the mansion-house and the greater part of the trees stood, was comprised in the settlement, yet the veins of coal under it, with power to sink pits and do other acts on any part of the surface for getting the coal, were reserved by the person of whom the settlor purchased the land and part of the lawn; and that the rest of the lawn and the whole of the pleasure-grounds, were formed out of the leasehold land; and that land formed so essential a part of the demesne, both in extent and position, as to render the remaining part of the lawn totally unfit for that purpose if separated

therefrom: that the Defendant had lately divided the leasehold part into small inclosures, some of which were under tillage, and thereby its former character was destroyed: that, owing to the smoke arising from copper-works in the neighbourhood of the mansion-house, and to the probability of the veins of coal under it being worked, which would render it unsafe, the settlor quitted it and shut it up, about five years before his death, and made preparations for building a family mansion on his property at *Sketty*, and actually formed a park, pleasure-ground and garden there; and that, in 1820, the Defendant proceeded to complete what his father had begun, and pulled down the old mansion-house and used the materials in building a new one at *Sketty*: that, before the old house was pulled down, a coal-pit was actually opened on the lawn in front of it, and another had been since opened in another place near the site of it, and, in consequence thereof and of the smoke of the copper works, the neighbourhood was totally unfit for a gentleman's residence: that the trees which the Defendant had cut down, had arrived at maturity, and, though they were originally planted for shelter and ornament, they had ceased to have that character: in addition to which the smoke of the copper works was injurious to trees, and, on that account, many gentlemen in the neighbourhood had cut down all the timber on their estates.

Mr. *James Parker* and Mr. *Beales* now moved for the injunction.—They said that the Defendant alleged, as a justification for cutting down the trees, that he had pulled down the old house; which was an act of waste; and that one act of waste did not justify another: that the settlement contained a power to grant building leases; and it appeared, from the affidavits, that the land on or near which the trees stood, afforded several

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good building sites: and that the Defendant did not venture to swear that any of the trees which he had felled or marked for felling, were injured by the smoke of the copper works. They cited *Wellesley v. Wellesley* (a), and *The Duke of Leeds v. Lord Amherst* (b).

Mr. Bethell and Mr. Rasch for the Defendant:

The case of *Wellesley v. Wellesley* is very different from the present: for the pulling down of *Wanstead-house*, was authorized by the settlement, but the felling of the trees in the park, was not; therefore, the settlement, impliedly at least, protected the trees. Besides, there were villas in or near the park, to which the trees were ornamental; and there was a probability of *Wanstead-house* being re-built. But, in this case, there is no probability, or even possibility of the old mansion being restored. The pleasure-grounds, too, and part of the lawn, have become absolutely vested in the Defendant, and he has destroyed their character; and thereby the small fragment that remains, has become wholly unfit for the purposes of a lawn. In *The Duke of Leeds v. Lord Amherst*, the bill complained of the entire act of waste, that is to say, of the pulling down of *Keeton Hall*, as well as the felling of the timber: but the bill in this case, does not complain of the house being pulled down. And, that being so, and as the pleasure-grounds and lawn have been destroyed as such, the trees can be no longer considered as ornamental; and, consequently, this Court ought not to interfere to protect them.

The VICE-CHANCELLOR:

This is a very simple case.

(a) *Ante*, Vol. VI., p. 497.

(b) *Ante*, Vol. XIV., p. 357.

It is very painful to see a son asserting rights against his father under any circumstances; but, if the son has rights, they must be protected.

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It is observable that, strictly speaking, the Defendant has no right whatever to cut timber, because he has no legal estate. The property is limited to the trustees during his life, without impeachment of waste, provided that the same should be committed with his privity and assent. Strictly speaking, therefore, he has not any right to cut the trees. No objection has been made on account of the trustees not being parties to the record; nor do I think that it at all affects the substance of the case. Then it comes to this: that the Plaintiff, who has a legal estate for life in remainder, complains of the act which has been done by his father, who is the *cestui que trust* of the legal estate in possession, which is vested in the trustees during his life.

Now it appears to me that the general rule regarding trees planted for shelter and ornament, must apply to this case, unless, upon the face of the settlement, or independently of the settlement, you can shew that the rule is not applicable.

I admit that this case differs very widely in some respects from the case of *Wellesley v. Wellesley*; but I observe that there is a power in the settlement to demise to persons who shall be willing to build houses or to repair houses; and I think that that does tend to sustain the right of those in remainder to have the trees preserved which were originally planted for shelter and ornament. Because, though the mansion-house, which the trees were intended to shelter and ornament, no longer exists, yet there is a possibility of leases being made for the

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purpose of building houses which may receive a benefit from the ornament or the shelter afforded by the trees; and, in that respect, it is something like the case of *Wellesley v. Wellesley*. But my opinion is that I am bound to administer the general law of this Court, which will not permit the person who is merely tenant for life without impeachment of waste, to cut down these trees, which it is admitted on all hands were either planted or left standing for shelter and ornament. Therefore I shall grant the injunction*.

* A motion to discharge the order was refused by the Lord Chancellor

1847:

16th February.

"Survivor or
Survivors."

Will.

Construction.

Testator bequeathed a fund in trust for *Elizabeth D.* for her life, and, after her decease, in trust for four of her children, whom

he named: "or the survivor or survivors of them, for their maintenance, until they severally attain the age of twenty-one years, when each of them will be entitled to claim a fair proportion of the principal." Only one of the children survived the mother.

Held that that one was entitled to the whole fund, though two of the deceased children attained twenty-one.

DORVILLE v. WOLFF.

THE testator in this cause made the following bequest by a codicil to his will, dated the 8th of February 1814: "I give and bequeath to my dear friend, *Elizabeth Dorville*, one annuity of 200*L.* for and during her natural life, and, after her decease, in trust for her children, namely, *Elizabeth, Henry, Arabella*, and *Georgiana Dorville*, or the survivor or survivors of them, for and towards their maintenance and support until they severally attain the age of twenty-one years, when each will be entitled to claim a fair proportion of the principal,

in order to secure the said annuity of 200*l.* to my friend *Elizabeth Dorville* and her children, I direct a sum of money sufficient to produce the said annuity of 200*l.*, be vested or disposed of in Government securities in the names of my trustees."

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The testator died in 1815. *Elizabeth Dorville* and her children named in the codicil, survived the testator. Three of them died in her lifetime, two being daughters, and the other an infant. *Elizabeth Dorville* died in 1844. Her only surviving child claimed, as such, the annuity that had been provided for payment of the annuity.

For *Bethell* and Mr. *Collins*, in support of that claim, *Cripps v. Wolcott* (a), *Blewitt v. Roberts* (b), *Pope v. Whitcombe* (c), *Wordsworth v. Wood* (d).

For *Hodgson* and Mr. *Glasse*, for the personal representative of the two deceased children who attained twenty-one, said:

The gift is made to the children, not as a class, but as individuals, by their names; and, when they should attain twenty-one, each was to be entitled to claim a fair portion of the principal. Therefore we submit that the children who attained twenty-one, took absolute and vested interests; that is to say, that the words, "survivors," mean those who should live to attain twenty-one.

4 Madd. 11. (d) 2 Beav. 25; and 4 Myl.
Craig & Phill. 274. & Cr. 641.
3 Russ. 124.
XV. M M

1846.

DORVILLE

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WOLFF.

Mr. *Sheffield* appeared for the trustees of the fund.

The VICE-CHANCELLOR:

The children could not *claim* a share of the principal unless they survived their mother; and it is clear to my mind, taking the whole of the bequest together, that the testator intended those children only to take a share, who should survive their mother.

He seems to have made his will under the impression that Mrs. *Dorville* would die, leaving her children infants.

Decree that the Plaintiff, as the only child of *Elizabeth Dorville* who survived her, is entitled to the whole of the fund.

WALL v. WALL.

By the settlement on the marriage of *William Wall* and *Elizabeth* his wife, dated the 11th of September 1802, certain sums of money and stock were settled in trust, after the death of the survivor of them, for their younger children. There was issue of the marriage a son and a daughter only. The settlement did not contain any power to invest the funds comprised in it in the purchase of lands; but, in or prior to 1830, the whole of them was so invested with the consent of *Wm. Wall* and his son and daughter, and the lands purchased therewith were conveyed to the trustees upon the trusts of the settlement.

In 1835, the daughter married the Baron *de Thoren*; and, in December 1836, *William Wall* settled a freehold estate of the yearly value of 890 *l.* on them and their children; and, in August 1840, he settled 1000 *l.* 3½ *l.* per cent. stock on the Baroness and her children.

William Wall, by his will dated the 29th of July 1842, devised his real estates to his son, *William Ellis Wall*, and *Edward Jones Williams* in fee, to the use, intent, and purpose that they should permit his wife, *Elizabeth*

est from the death of the testator, but only from the end of the first year after that event.

1847:
20th and 21st
February;
and
13th April.

Annuity.
Property-Tax.

A testator gave to his wife an annuity or clear yearly rent-charge of 1800 *l.*, clear of all taxes and deductions. Held that the annuity was subject to property-tax.

Interest.
Legacy.

A testator made a settlement on his daughter, who was adult, and gave her a legacy by his will. Held that the legacy did not bear inter-

Husband and Wife.—Election.

A testator gave a legacy to his daughter, a married woman, on condition that she should relinquish her claim to a reversionary chose in action under his marriage settlement. Qu. whether she could elect to take the legacy against the will of her husband.

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Wall, during her life, to receive, out of the rents thereof, and also out of the income of his residuary personal estate thereafter bequeathed to them, an annuity or clear yearly rent-charge of 1800 *L.*, *clear of all taxes and deductions*, and, subject thereto, to the use of *William Ellis Wall*, for his life, with remainders to his first and other sons successively in tail male; and he bequeathed his residuary personal estate to *William Ellis Wall* and *Edward Jones Williams*, in trust, as to 18,000*L.* part thereof (and which he charged on his real estate in case his personal estate should be insufficient), to invest the same, as soon as conveniently might be after his decease, on Government or real securities, and to pay the interest of the securities to his daughter, the wife of the Baron *de Thoren*, for her separate use and without power of anticipation, during her life, and, after her decease, in trust as to the sum of 9000 *L.*, part of the 18,000 *L.*, for such one or more of her children or of their or any of their issue born in her lifetime, as she should appoint by deed or will, and, in default of such appointment, and also as to the sum of 9000 *L.*, the residue of the 18,000 *L.* in trust for her children in equal shares; and, after reciting (as the fact was), that his daughter, under his marriage settlement, would become entitled, as a younger child, to upwards of 12,000 *L.*, declared *that so much of the said sums of 9000 L. and 9000 L. so thereby given to or in trust for her, should be abated and reduced to such an amount as she should be entitled to receive as a younger child as aforesaid; it not being his intent and meaning that she should be entitled, under the settlement, to her portion as a younger child, as well as the said sums of 9000 L. and 9000 L.;* and, after disposing of the remainder of his residuary personal estate, he declared that the provisions in and by his will made for his wife and children, were so made for them, and that they should re-

spectively accept and take the same in full discharge, lieu, and satisfaction of and for all and every the estates, sum and sums of money, and other provisions given to or made for them respectively in and by the settlement made previous to his marriage with his said wife, and that his wife should also accept and take the same in bar, satisfaction, and discharge of all her claims of dower and thirds at common law and free bench by custom or otherwise, of, in, to, or out of all and every his real and personal estate; and he directed that his said wife and children should, when thereunto requested, seal and execute to his trustees for the time being, all such releases, acquittances, and discharges of such their respective claims and demands, and also convey and assure and cause to be well and effectually conveyed, all and every the estates purchased with the monies in the said settlement mentioned, upon the trusts of his will, as, by his trustees or their counsel, should be reasonably devised or advised and required.

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WALL

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WALL.

The testator died in October 1844, leaving his wife and the other persons named in his will, him surviving.

The Plaintiff was the eldest son of *William Ellis Wall* and the first tenant in tail of the estates devised by the will. The bill was filed to carry the trusts of the will into execution. It alleged, amongst other things, that the testator's widow and the Baroness *de Thoren* ought to elect whether they would take the benefits given to them by the will, or the provisions made for them by the settlement; that, though the former was willing to elect to take under the will, the latter was unwilling to declare her election until it had been ascertained whether it would be for her benefit, or for the benefit of her and her children (all of whom were infants)

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v.

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to elect to take the benefits given to them by the will, in preference to those provided for her by the settlement, and whether her election would extend to any benefits given to her children by the will, or to her own life-estate and interest only under it; that the Baron *de Thoren* alleged that he could not be bound by the election of his wife; but the bill charged that, whatever rights, if any, the Baron might acquire by operation of law, in right of his wife, in the trust funds and monies comprised in the settlement or the real estates purchased therewith, were subject to the Baroness's sole and exclusive right of election, and that, in case she should elect to take under the will, the whole of those trust funds and monies, or the real estates purchased therewith, would sink into and form part of the testator's residuary estates, and pass according to the disposition made thereof by the will.

The Baron and the Baroness put in a joint answer. The Baroness elected, so far as she lawfully could, to take under the will; and the Baron submitted that his rights could not be prejudiced by his wife so electing.

The cause was heard in February 1846; and, in pursuance of the decree then made, the *Master* reported that it would be for the benefit of the Baroness to elect to take under the will.

The cause now came on to be heard for further directions.

Mr. *Stuart* and Mr. *Greene*, for the Plaintiff:

The questions to be decided are, first, whether the election of the Baroness to take under the will, will or

will not bar the Baron from claiming, by virtue of his marital right, his wife's interest under her father and mother's marriage settlement, when that interest, which is now reversionary, shall come into possession by her mother's death.

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Secondly, whether the Baroness is entitled to interest on the 18,000 £ from her father's death, or only from the end of the first year after that event? And

Thirdly, whether, as the will directs that Mrs. *Wall's* annuity of 1,800 £ shall be clear of all taxes and deductions, she is entitled to be paid it free from property-tax?

We submit that the Baron cannot interfere with his wife's right to elect, and that he will be bound by her election: *Ardesoife v. Bennet* (a), *Lady Cavan v. Pulteney* (b), *Bradish v. Bradish* (c), and 1 Roper on Husband and Wife, Jacobs's edit., p. 30, note.

The Baroness *de Thoren* is not entitled to interest on the 18,000 £, from the death of the testator, but only from the end of the first year after his death; for not only was she adult when the will was made, but her father made a provision for her in his lifetime: *Raven v. Waite* (d), *Leslie v. Leslie* (e).

Elizabeth Wall, the testator's widow, is not entitled to be paid her annuity of 1,800£., free from property-tax. It is charged on real estate. The tenants will

(a) 2 Dick. 463.

(b) 2 Ves. jun. 544.

(c) 2 Ball. & Beat. 479.

(d) 1 Swanst. 553.

(e) Lloyd & Goold's Rep. temp. Sugden, page 1; and

see page 6, note.

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deduct the tax out of their rents, and the trustees of the will have a right to deduct it out of the annuity (f).

Mr. *Sidebottom*, for the widow, contended that, as her annuity was to be clear of all taxes and deductions, she was entitled to be paid it in full: *Barksdale v. Giliat* (g).

Mr. *Walker* and Mr. *Dickinson* appeared for *William Ellis Wall*, the Plaintiff's father.

Mr. *Parry*, for the Baroness *de Thoren*, contended, first, that the Baroness's right to elect could not be controlled or interfered with, in any manner, by her husband; that he would be precluded from enforcing his marital right to the settled funds, at any future time, by the Court declaring, as it ought to do, that the Baroness had elected to take under the will, and directing the trustees of her father and mother's marriage settlement, to convey the estates in which the settled funds had been invested, to the trustees of the will.

In support of the Baroness's right to be paid interest on the 18,000 *l.* from the testator's death, he relied on *Dowling v. Tyrell* (h), and on the direction, in the will, to invest the 18,000 *l.* in Government or real securities as soon as conveniently might be after the testator's decease.

Mr. *James Parker* appeared for the children of the Baron and Baroness.

(f) See 5 & 6 Vict. c. 35, s. 102; and 8 & 9 Vict. c. 4.

(g) 1 Swanst. 562.

(h) 2 Russ. & Myl. 343.

Mr. *Bethell* and Mr. *Malins*, for the Baron *de Thoren*, said that it was contrary to the policy of the law to interfere with rights conferred by marriage ; besides which, the wife's interest under her father and mother's marriage settlement, could not now be dealt with ; for, notwithstanding the settled funds had been invested in the purchase of real estates, they must be considered as personal estate, and, the wife's interest being reversionary, any order that might be made respecting it, would be nugatory : moreover, that the testator did not attempt to affect, or even refer to the rights of the Baron, but only to the rights of the Baroness ; and that all that he meant was that, if she should survive both her mother and her husband, she should then execute a release or conveyance of the settled funds or the estates on which they had been invested, to the trustees of his will : *Jordan v. Jones* (i), *Brodie v. Barry* (k), *Frank v. Frank* (l).

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Mr. *Koe* and Mr. *Stinton* appeared for the trustees of the testator's will and marriage settlement.

Mr. *Stuart* replied.

THE VICE-CHANCELLOR :

13th June.

I have read over the papers in *Wall v. Wall* ; and it seems to me that there is no difficulty with respect to any one of the questions which were brought before me, except that which regards the election.

With respect to the question about the interest on the 18,000 £. for the first year after the testator's de-

(i) 2 Phill. 170.

(k) 2 Ves. & Beam. 127.

(l) 3 Myl. & Cr. 171.

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cease, my opinion is that it is not due; because the provision is a general legacy made, certainly, to a child, but to an adult child, and to one for whom a provision had been made; nor is there any direction with regard to maintenance; and, therefore, according to the case of *Raven v. Waite*, (which states the law very clearly,) interest for the first year is not payable.

Then, with respect to the question about the payment of the widow's annuity free from property-tax. I have looked at the 102nd section of the Property-tax Act, and it is quite plain, from the language of that section, that the thing that is given is the thing that is to pay the tax. The words of the section cannot be so strained as to mean that, whether the property-tax be increased or decreased at any future time during the continuance of the annuity, the annuitant is to receive, every year, a sum of a given amount. The words amount to nothing like that; and my opinion, therefore, is that the annuitant is liable to pay the property-tax.

Lastly, with respect to the question of election.

In the first place, it is to be observed that this is not a case of election in the common sense of the word, where the election arises, simply, from a person making a disposition, as his own, of that which is not his own. But, here, there is a double declaration. For the testator first directs, in very singular words, that the amount which he has given by his will, shall be diminished by the amount of the provision which had been made by the settlement; and then, in a subsequent part of his will, he expressly declares, in language somewhat inconsistent with the first, but he does expressly declare that that which is given, as a provision, by the settlement, shall

be given up in case his daughter takes that which is given by the will. But then there is this to be remarked, namely, that the provision as it now stands under the settlement, is a reversionary *chose in action* of the daughter, which will not vest in possession until the death of her mother, and there is no method now known to the law by which that reversionary interest can be absolutely given up at the present time. It cannot effectually be released; nor can it be assigned. Besides which, if the Court is to elect, upon the *Master's* report, on behalf of the wife, I do not see how that election can prevail against the dissent of the husband. Neither do I see how the question, whether it can be carried into effect against the wish of the husband, can be determined in a case constituted as this is, with the husband and wife co-defendants. And, therefore, if the parties think that, during the life of the mother, any thing can be done, effectually, in the way of decision with respect to this case of election, the matter must be brought before the Court in a suit in which the daughter and her husband are adverse claimants, that is to say, one a Plaintiff and the other a Defendant; for, otherwise, I do not think that the Court has any jurisdiction. And it seems to me that all that can be done at present, is to direct that the sum of 18,000*l.* shall be set apart to abide the ultimate decision of the Court, whenever the question is so raised as that the Court can decide it. But, at present, I do not think that I have any jurisdiction, whatever, to decide, on the question of election, against the husband, who dissents from the view which his wife takes.

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WALL.

The Baron *de Thoren*, afterwards, consented to his wife's electing to take under the will; and, accordingly,

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the order on further directions, which was dated the 3rd of August 1847, was, in part, as follows: " And the said Defendants the Baron *de Thoren* and *Millicent* his wife, by their counsel, electing to take, under the said testator's will, the benefits thereby intended for her, in lieu of the benefits and provision made for her by the said settlement of the 11th day of September 1802, it is ordered that the 18,807*L* 7*s*. 8*d*., Bank 3*l*. per Cent. Annuities standing in the name of the Accountant-General of this Court in trust in this cause, to an account called, 'The legacy account of the Baroness *de Thoren* and her children,' be deemed and taken as in full satisfaction of the legacies of 9,000*L* and 9,000*L*., making together 18,000*L*., bequeathed in trust for the benefit of the said Defendant *Millicent de Thoren* and her children, by the said testator's will. The order then directed the Baron and Baroness and the trustees of the settlement, to convey the estates purchased with the monies and funds comprised in the settlement, to the trustees of the will, upon the trusts so thereby declared of the testator's residuary real estates, to be held by those trustees freed and absolutely discharged from the trusts, powers, conditions and agreements of the settlement; and, upon the conveyance being executed by the Baron and Baroness, the dividends of the 18,000*L* Bank Annuities, to be paid, to the Baroness, for her separate use, during her life or until further order.

WATSON v. BIRCH.

the hearing of a petition and cross-petition, the
 or presented by *Mary Elizabeth Rudd*, the personal
 sentative of *Richard Rudd*, a judgment creditor of
el Birch who died in 1813, to be paid the debt out
 fund in Court which had arisen from *Birch's* assets;
 he latter presented by *Birch's* personal representa-
 to have the fund transferred to him.

re question was, whether the 40th section of the
 ite of Limitations (3 & 4 Will. 4, c. 27), which the
 -petitioner's counsel contended was a bar to the re-
 ought by the original petition, applied to a case in
 h payment of a judgment-debt was sought, not out of

1847 :
 27th February.

*Statute of
 Limitations.
 Judgment.
 Debt.*

The 40th sec-
 tion of the Sta-
 tute of Limita-
 tions (3 & 4
 Will. 4, c. 27)
 applies to a case
 in which a judg-
 ment is sought
 to be enforced
 against the per-
 sonal estate, as
 well as to a

case in which it is sought to be enforced against the land of the
 debtor.

A., a creditor of a person deceased, filed a bill on behalf of him-
 self alone, against *B.*, the personal representative of the debtor,
 and *C.*, who had in his possession certain papers belonging to the
 debtor, on which he claimed a lien for a debt alleged to be due
 to him from the deceased. The bill prayed for the usual accounts
 of the deceased's estate, and that it might be applied in a due
 course of administration; that *A.* might have access to the papers;
 and that the amount of *C.'s* lien, *if any*, might be ascertained and
 paid. The decree in the cause directed an account to be taken
 of *A.'s* debt, and the amount to be paid out of a fund in Court; and,
 if the fund should be more than sufficient for that purpose, that
 what should be found due to the other incumbrancers should be
 paid to them: but it did not direct any account to be taken of
 those incumbrances: and, accordingly, the Master took an ac-
 count of *A.'s* debt only. After it had been paid, *C.* presented a
 petition in the suit, praying for an account of what was due to
 him, and for payment of it out of the remainder of the fund. The
 order made on that petition, directed the Master to inquire and state
who were the incumbrancers, other than A. referred to by the decree.

Held that neither the institution of the suit, nor any of the pro-
 ceedings in it, prevented the Statute of Limitations from running
 against *C.'s* claim.

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WATSON
v.
BIRCH.

the real estate, but out of the personal estate of the debtor. That section enacts that no action or suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless, in the meantime, some part of the principal money or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable or his agent, to the person entitled thereto or his agent; and, in such case, no such action, or suit, or proceeding, shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given.

Mr. Koe and Mr. *James Parker* supported the original petition.

Mr. *Bethell*, Mr. *Spurrier* and Mr. *W. R. Ellis*, supported the cross-petition.

THE VICE-CHANCELLOR:

The language of the 40th section of the recent Statute of Limitations is general. There is nothing in the word, "judgment," as there used, to confine its meaning to a judgment which, owing to the nature of the assets of the party indebted, might affect land, but could not operate on personal estate. The intention of the legislature was that no proceeding whatever should be taken on a judgment after the lapse of twenty years from the time when the money secured by it became due, unless some pay-

ment should have been made on account of it, or some acknowledgment of it should have been given in writing within the period of twenty years.

1847.

WATSON
v.
BIRCH.

Another question on the hearing of the petitions, arose under the following circumstances:

In 1817, *John Fraser*, who was an annuity-creditor of *Samuel Birch*, filed a bill, on behalf of himself alone, against *Birch's* personal representative and *Richard Rudd*, praying that the usual accounts might be taken of *Birch's* estate, and that it might be applied in a due course of administration; and for the production of certain documents relating to *Birch's* affairs, which were in *Rudd's* possession, and on which that gentleman, who had been *Birch's* solicitor, claimed a lien for the amount of his judgment-debt; and praying also that such lien, if any, might be ascertained, and paid according to its priority, and that all proper directions might be given for ascertaining the amount of it, if any, and its priority. *Rudd* died without having answered the bill, and the suit was revived against *Mary Elizabeth Rudd*, his personal representative. She, by her answer, admitted that the documents were in her possession, and that *Richard Rudd* had claimed a lien on them for the amount of his debt; and she submitted that she, as his personal representative, had the same lien on them, and that she was not bound to produce them until the debt was paid. The cause was heard on the 5th of August 1834, when an account was directed to be taken of what was due to *Fraser* for the arrears of his annuity, and the amount of them was ordered to be paid out of the fund in Court; and, notwithstanding the decree did not direct any account to

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BIRCH.

be taken of what was due to the other incumbrancers on *Birch's* estate (a), it ordered that, if the fund in Court should be more than sufficient to pay *Fraser's* debt, what should be found due to the other incumbrancers, should be paid to them according to their priorities, and that the residue of the fund should be paid to *Birch's* representative.

Some time afterwards, *Mary Elizabeth Rudd* presented a petition in the suit, stating, amongst other things, that *Fraser* had been paid what the *Master* had found due to him in pursuance of the decree; that *Birch* paid *Richard Rudd* two sums, one in 1797 and the other in 1798, on account of his debt; and that, *Fraser* having been paid, the petitioner was the first incumbrancer on *Birch's* estate; and praying that it might be referred back to the *Master*, to take an account of what was due to the petitioner, as the personal representative of *Richard Rudd*, under the judgment; that, if necessary, the *Master* might advertise for the creditors of *Birch* to go in before him and prove their debts, and that the petitioner might be paid what should be found due to her. In May 1846, an order was made on that petition, by which the *Master* was directed to inquire and state who were the incumbrancers, other than *Fraser*, mentioned in the decree, and what was due to them respectively, and what were their priorities. In December 1846, the *Master* found that *Mary Elizabeth Rudd*, as the personal representative of *Richard Rudd*, was the only remaining incumbrancer on *Birch's* estate, and that 3,751 *l.* were due to her. She then presented the petition mentioned at the commencement of this case, praying that the *Master's*

(a) Reg. Lib. B. 1833, fol. 1413.

report might be confirmed, and that she might be paid the 3,751 l. out of the fund in Court. And *Fraser's* representative presented the cross petition, stating that the original petition presented by *Mary Elizabeth Rudd*, was the first proceeding that had been taken to recover the judgment debt, and claiming the benefit of the 3rd & 4th Will. 4, c. 27, and praying that the *Master's* report might not be confirmed, and that the fund remaining in Court might be paid to him.

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BIRCH.

The *Vice-Chancellor* having decided, as before mentioned, that the 40th section of the act applied to judgments generally,

Mr. *Koe* and Mr. *James Parker* contended, secondly, that the suit instituted by *Fraser*, prevented *Mary Elizabeth Rudd's* claim from being barred by the Act; inasmuch as the bill in it prayed, not only that the usual accounts might be taken of *Birch's* estate and that the same might be applied in a due course of administration, but also that the amount of the lien, if any, which *Richard Rudd* had on the estate, might be ascertained and paid. They added that it was evident, from that part of the prayer and also from the bill not having been dismissed as against *Mary Elizabeth Rudd*, that both she and *Richard Rudd* were made parties to the suit in the character of incumbrancers, and not for the purpose of discovery merely; and that the decree directed that what should be found due to the other incumbrancers on the estate besides the Plaintiff, should be paid to them according to their priorities; and that, though it did not direct an account to be taken of their incumbrances, in which respect it was manifestly defective, the defect would have been supplied if the cause had been re-heard, and that it was afterwards supplied by

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the order made on the first petition presented by *Mary Elizabeth Rudd : Sterndale v. Hankinson* (b).

Mr. *Bethell*, Mr. *Spurrier*, and Mr. *W. R. Ellis*, said that the statute enacted, not only that no action or suit should be brought, but that no other proceeding should be taken for the recovery of any sum of money, except within the time prescribed by it; that the presenting of a petition, or going in before the *Master*, was as much a proceeding as the bringing of an action or suit was; that *Fraser's* suit was instituted, not as *Sterndale v. Hankinson* was, by one creditor on behalf of himself and the other creditors of *Birch*, but by a specific incumbrancer on behalf of himself alone; and that *Richard Rudd* and *Mary Elizabeth Rudd* were made parties to it for the purpose of discovery only; and, accordingly, the decree did not direct an account to be taken of any incumbrance on the estate except the Plaintiff's, and, when his debt was paid, the suit was at an end; and, consequently, the petition presented by *Mary Elizabeth Rudd* was irregular, and the Court had no jurisdiction to make an order upon it, but ought to have dismissed it: *Berrington v. Evans* (c), *Farras v. Beresford* (d), *Lord St. John v. Boughton* (e).

The VICE-CHANCELLOR, after observing that *Sterndale v. Hankinson* was decided before the 3rd & 4th Will. 4, c. 27, was passed, delivered the following judgment:

As I have expressed it to be my opinion that the

(b) *Ante*, Vol. I., page (d) 10 Cl. & Fin. 319.
393. (e) *Ante*, Vol. IX., page
(c) 1 Youn. & Coll. Exch. 219.
Ca. 434.

statute prevents any proceeding being taken to enforce judgment against either land or personal estate after the expiration of the time limited by it, it seems to me that the matter is concluded, unless there was something in the bill filed in 1817, or in the proceedings upon it, which prevented the statute from operating. cannot, however, make out that there was anything that could have that effect.

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The suit was instituted by a creditor of *Samuel Birch*, on behalf of himself alone, and not on behalf of himself and the other creditors; and, therefore, it was not what is usually termed a creditor's suit. It prayed that the usual directions might be given for taking the accounts of the estate and effects of *Samuel Birch*, and for the application thereof in a due course of administration; that the letters and other documents which were in the possession or power of *Richard Rudd*, might be produced and deposited in some place of safety, and that the Plaintiff might have access thereto; and that the lien, if any, which *Richard Rudd* had thereon might be ascertained, and the amount paid to him in the priority which he might be found to stand. Now that is as unlike a bill praying for a decree of which all the creditors might have the benefit, as well can be, especially with respect to *Rudd*; for, so far from admitting that he had any right to the lien alleged to be claimed by him, the bill prayed that the lien, *if any*, which he had on the documents, might be ascertained, and that all necessary directions might be given to ascertain the amount of such lien, *if any*. Then what did the decree do? After giving some directions not at all affecting the present question, it directed that the *Master* should make an account of what was due to *Fraser*, in respect of the arrears of his annuity; that the fund in Court

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should be sold, and that, out of the money to arise from such sale, *Fraser* should be paid what should be found due to him, and that, out of the residue, what should be found due to the other incumbrancers upon the estate, should be paid to them according to their respective priorities, and that the remainder should be paid to *Birch's* personal representative. Was there then any direction to treat *Rudd* as a creditor? There was none whatever. And the parties felt it to be so; for, until the petition was presented by *Mary Elizabeth Rudd*, nothing was done by which *Rudd's* estate could derive any benefit from the decree. Her petition was then presented; and what she asked by it was that it might be referred back, to the *Master*, to take an account of what was due to her, as the personal representative of *Richard Rudd*, under or by virtue of the judgment which he had obtained against *Birch*, and that she might be paid what should be found due to her out of the fund remaining in Court. Then, what did the Court do upon that petition, which pointedly asked that it might be referred back, to the *Master*, to take an account of what was due, to the petitioner, under the judgment? Instead of acceding to the form of the prayer, it directed a general reference to the *Master* to inquire and state who were the incumbrancers, other than the Plaintiff, *Fraser*, mentioned or referred to in and by the decree, and what was due to them respectively, and what were their respective priorities. There was, therefore, no acknowledgment of the Plaintiff's right.

It seems to me that the language of the statute is imperative, and that it binds this case: and, consequently, the *Master* was wrong in finding the sum mentioned in his report, or indeed any sum whatever, to be due to *Mary Elizabeth Rudd*.

LORD MIDLETON *v.* ELIOT.

THIS was a suit to redeem a mortgage in fee, and to restrain an ejectment which the mortgagee had brought to recover possession of the mortgaged estate, after the Plaintiff had given the mortgagee notice of his intention to pay off the mortgage on the 25th of March 1842, being six months after the date of the notice, but which he did not do, because he was informed, after he had served the notice, and after the mortgagee's solicitor had approved of a draft of the re-conveyance of the estate which the Plaintiff's solicitor had prepared and sent to him, that the mortgagee had lost three of the title-deeds relating to the estate, and because the mortgagee had not offered to indemnify him, in respect of the loss, in a manner that was satisfactory to him.

The bill which was filed in February 1843, prayed, in addition to the redemption and injunction, that an enquiry might be directed as to the loss of such of the title-deeds as were alleged to be lost; and, if it should appear that the same were in fact lost, by whom and under what circumstances they were lost; and that the mortgagee might either procure all necessary parties to execute deeds to supply the place of the lost ones, or indemnify the Plaintiff from the consequences of the loss.

the estate; whereupon *A.* filed a bill to redeem.

The Court decreed a redemption, and ordered that a sum which *A.* had paid for interest accrued on the mortgage-money after the expiration of the six months, should be re-paid to him; that *B.* should give him an indemnity to be approved of by the Master, and also pay the costs of the ejectment and of the suit.

1847:
9th and 11th
March.

*Mortgagor and
Mortgagee.
Loss of Deeds.
Interest.
Costs.*

A. made a mortgage to *B.*, and delivered to him the title-deeds of the estate. Some years afterwards, *A.* gave *B.* notice of his intention to pay off the mortgage at the end of six months; but did not pay the money until after that time, owing to *B.* not having offered him any indemnity that was satisfactory to him, in respect of *B.* having lost some of the deeds. *B.* then brought an ejectment for

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The injunction was granted on the 1st of April 1843. The order for it directed the Plaintiff to pay the mortgagee, on or before the 15th of that month, the principal sum secured by the mortgage, with interest up to the time of payment, from the 25th of March 1842, *(the day on which the six months mentioned in the notice expired, and up to which all interest had been paid)*; and it reserved *the costs of the application and of the ejectment*, and ordered that the payment of interest thereby directed, *should be without prejudice to any question in the cause.*

The cause was heard in April 1845. The decree directed the *Master* to inquire and state whether the three missing deeds, or any and which of them, had been lost by the mortgagee or his agent, after they came into the possession of his solicitor.

The following facts were stated in the *Master's* report made in pursuance of the decree:—On the execution of the mortgage, the Plaintiff delivered the title-deeds of the estate to the mortgagee's solicitor, who sent all of them, except the three in question, in two boxes, and afterwards sent those three, to a banking-house in which the mortgagee was a partner. The house subsequently failed. On its failure, the mortgagee's solicitor sent for the deeds, and received two boxes, which, he then supposed, contained all the deeds; but it afterwards appeared that they did not contain the three which had been sent separately. Under these circumstances, the *Master* was of opinion that the omission of the mortgagee's solicitor to examine the deeds re-delivered to him, in order to ascertain whether they were all that he had deposited in the banking-house, was the cause of the three being lost.

The cause now came on to be heard for further directions. The questions discussed, related to the indemnity to be given by the Defendant to the Plaintiff for the loss of the deeds: to the interest paid by the Plaintiff in obedience to the Order of April 1843, and to the costs of the suit and ejectment.

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LORD
MIDDLETON
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Mr. Rolt and Mr. Roundell Palmer, for the Plaintiff,
vs. Stokoe v. Robson (a).

Mr. Walker, Mr. Berens, and Mr. Freeling, for the Defendant, cited *Wiltshire v. Smith* (b), *Gyles v. Hall* (c), *Smith v. Bicknell* (d), *Woodroffe v. Wood* (e), *Shelmarne v. Harrop* (f), *Luccraft v. Hite* (g), *Macartney v. Graham* (h), and *Hodges v. The Croydon Canal Company* (i).

The VICE-CHANCELLOR:—

In this case (I do not understand it to have been so in any other case) there was a great deal of discussion and dispute, between the parties, prior to the filing of the bill. A notice had been given to the mortgagee, that Lord Middleton intended to pay the principal and interest due on the mortgage, on the 25th of March 1842, which was six months from the date of the notice. The mortgagee accepted the notice, and treated it as a good one; and it would have been acted upon, but for

(a) 19 Ves. 385, and 3 Ves. Beam. 51; and Seton on decrees, pp. 224, 225, and 226, where the decree and order on further directions in the cause, are set forth.
(b) 3 Atk. 89.
(c) 2 P. W. 378.

(d) 3 Ves. & Beam. 51, n.
(e) 1 Dick. 32.
(f) Madd. & Geld. 39.
(g) 2 Hare, 14, n.; and Reg. Lib. B. 1785, fol. 203.
(h) 2 Russ. & Myl. 353.
(i) 3 Beav. 86.

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the circumstance that Lord *Middleton* was informed, some months after he had served it, that some of the title-deeds were lost. It was treated as a good notice by the mortgagee, because, on the 19th of March 1842, his solicitor sent his Lordship's solicitor a copy of the mortgage-deed, in order that a re-conveyance of the mortgaged estate might be prepared from it. Therefore it seems to me to be impossible to say, consistently with the view which the parties themselves entertained, that it was not a good notice. Here, then, I have a case in which, but for the loss of the deeds, all the principal and interest due on the mortgage would have been paid on the day on which the notice expired, and every thing would have gone on smoothly between the parties. The fact that some of the deeds were not forthcoming having been disclosed, a good deal of negotiation took place between the parties, relative to the indemnity to be given to Lord *Middleton*; and I think that his Lordship ought not to have been called upon to pay the subsequent interest; for he was prevented from paying off the mortgage at the time appointed, by a fact of which he knew nothing, and of which the mortgagee knew nothing until some months after the notice was given. I think, also, that the mortgagee ought not to have slept, as it were, upon the notice; but ought to have taken due care that Lord *Middleton* might safely pay off the mortgage, and have his estate re-conveyed to him on the day on which the notice expired.

It appears, from the *Master's* report, that all the title-deeds were delivered, at once, to the mortgagee, but that they were not all sent together to the banking-house. Three of them (one of which, at least, was a most important deed, for it was the conveyance of the

estate to Lord *Midleton*) were sent to the banking-house after the others had been sent there. That was the source of the evil; for, if all the deeds had been sent together, and especially if the three had been put into the boxes which contained the others, it may be reasonably presumed that all of them would have been returned.

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Then, as I said before, it was the duty of the mortgagee to take care that all the instruments should be forthcoming, or, at any rate, to ascertain what was the state in which they really were. Instead of which, he suffered Lord *Midleton* to continue impressed with the notion that, on the 25th of March 1842, he should be able to settle the whole transaction. Then a long correspondence took place, relative to the indemnity to be given by the mortgagee. But it does not seem to me to be at all necessary to consider whether his lordship ought or ought not to have accepted any of the proposals which were made to him by the mortgagee on that head; for I think that it is but fair policy on the part of a mortgagor whose title-deeds have been lost by the mortgagee, to institute a suit in order that a person with whom he may thereafter deal respecting the estate, may be fully satisfied of the loss; which can hardly be effected without a suit something like the present. If it had been the converse, if the bill had been filed by the mortgagee to foreclose, the inquiry would have been directed. Therefore I do not think that the non-acceptance, by Lord *Midleton*, of any of the terms which were proposed to him in the course of the correspondence, at all affects the case.

As then Lord *Midleton* would have paid the whole of the principal on the 25th of March 1842, but for the

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loss of the deeds, the sum which, in obedience to the order for the injunction, he paid for interest accrued after that day, must be returned to him.

With respect to the costs of the suit, the cases of *Stokoe v. Robson* and *Smith v. Bicknell*, shew that the party who lost the deeds and thereby occasioned the suit, must pay the costs of it. The costs of the ejectment, also, must be paid by the mortgagee; for a more useless proceeding can be hardly imagined: and it must be referred to the *Master* to approve of an indemnity, and the mortgagee must pay the costs of it, as well as the costs of the suit and of the action. The costs of the re-conveyance must, of course, be paid by the mortgagor.

Declare that the Plaintiff is entitled to redeem the mortgage-premises: let the injunction be made perpetual: and it appearing that the Plaintiff has, pursuant to the order made in this cause, dated the 1st day of April 1843 (the order for the injunction), paid to the Defendant the principal money due on the mortgage, let the Defendant re-convey the mortgaged premises free from all incumbrances done by him or any person under whom he claims, or any person claiming under him, and deliver up all deeds and writings in his custody or power relating thereto, upon oath, to the Plaintiff or to whom he shall appoint, such re-conveyance to be prepared by the Plaintiff and at his expense, but to be settled by the *Master* in case the parties differ about the same: and it appearing that the Plaintiff has, pursuant to the said order, paid to the Defendant the sum of 573*l.*, being interest at the rate of 4*l.* 10*s.* *per cent. per annum* on the sum of 12,500*l.*, the amount of the principal money then due on such mortgage, from

the 25th day of March 1842, (up to which time all interest had previously been paid) to the day of payment of such principal money, without prejudice as in the said order mentioned, let the said Defendant *repay the said sum of 573l. to the Plaintiff*, within a month after service of this order: and let the Defendant, *at his expense*, give to the Plaintiff a good and effectual indemnity or security, in respect of the loss of the several deeds mentioned in the said *Master's* report made in this cause, bearing date, &c., to indemnify the Plaintiff, his heirs and assigns, and his and their estate and effects, and the said mortgaged hereditaments and premises in the pleadings in this cause mentioned, of, from, and against all loss, costs, damages, charges and expenses, and other consequences which the Plaintiff, his heirs or assigns, or the said hereditaments and premises, shall or may incur, sustain, or become liable to, for or by reason, or on account, or in respect of the said loss of the said deeds, in any manner however; such indemnity or security to be settled by the *Master*, in case the parties differ about the same: and let it be referred to the *Taxing-master* in rotation, to tax the Plaintiff his costs of *this suit, and of the proceedings at law* in the pleadings mentioned: and *let the Defendant pay the Plaintiff the amount of his costs when taxed.*

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MIDDLETON
v.
ELIOT.

1847 :
12th March.

THE CORPORATION OF BRIDGNORTH v.
COLLINS.

*Accumulation.
Thellusson Act.*

Testator directed the income of certain portions of a trust-fund to be paid to A., B., C., &c., for their lives; and, on the death of the survivor of them, the fund to be sold, and the proceeds thereof, and also *the proceeds which should have accumulated in respect thereof*, to be divided amongst other persons.

Held that, though there were accumulations of the income of the fund which had arisen after the expiration of twenty-one years from the testator's death, the case was not within the Thellusson Act (29 & 30 Geo. 3, c. 98).

THE testator in this cause bequeathed 3,300*l.* to the Plaintiffs, in trust to place the same out at interest and to receive the dividends, interest, or proceeds arising therefrom, and to pay the proceeds of 2,000*l.*, part thereof, to his cousin, *Ann Stevens*, for her life, and, after her decease, to stand possessed of the 2,000*l.* or the securities on which the same should be placed, and the proceeds arising therefrom, upon the trusts thereafter mentioned; and, after declaring trusts of other parts of the 3,300*l.* in favour of other persons, one of whom was *Ann Lem*, for their lives, he directed the Plaintiffs, from and immediately after the death of the survivor of the said annuitants, to sell and dispose of the securities on which the 3,300*l.* should be invested, and to pay the money arising therefrom, and also the proceeds arising therefrom in manner aforesaid, and *also the proceeds which should have accumulated in respect thereof*, unto and amongst all his second cousins as should be living at the death of the survivor of the said annuitants; and he further directed that, in case there should be any doubt, difficulty, or question concerning the making out the claim of any person or persons of the degree of second cousins to him, to any share or shares of the said trust-monies to the satisfaction of the Plaintiffs, or any other difficulty or question should arise relating thereto, the said trust-monies and the interest accruing thereon, and *also the interest and dividends which should have accumulated in respect thereof*, should, at the expiration of two years from the time of the decease of the survivor

f the said annuitants, be divided equally between and amongst such person or persons as should have made good his, her, or their claim as second cousins to him, within that time.

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The testator died in October 1812. *Ann Lem* survived all the other annuitants named in the will, and died in September 1835, which being more than twenty-nine years from the testator's death, and consequently beyond the period prescribed by the Thellusson Act 39 & 40 Geo. 3, c. 98), the question at the hearing for further directions, was whether the fund arisen from the accumulations of the income of the trust fund made after the expiration of that period, did not belong to the residuary legatee named in the will.

Mr. *Cooper* and Mr. *Bird*, for the residuary legatee, said that the passages in the will which are printed in italics, amounted to an *express* direction to accumulate each annuitant's share of the income of the trust-fund, from his or her death, until the death of the survivor of the annuitants, and, in one event, for two years longer: and that, at all events, the fund was so disposed of as that there *necessarily* must be an accumulation, unless, which was a very improbable event, all the annuitants died on the same day; and, therefore, the case, if not within the words, was within the spirit of the Thellusson Act. They referred to *Elborne v. Good* (a), *Webb v. Webb* (b), *Macdonald v. Bryce* (c), *Lombe v. Stoughton* (d), and *The Attorney-General v. Poulden* (e).

(a) *Ante*, Vol. XIV., page 65.

(b) 2 Beav. 493.

(c) 2 Keen, 276.

(d) *Ante*, Vol. XII., page 304.

(e) 3 Hare, 555.

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COLLINS.

The *Vice-Chancellor*.—According to the statute, the twenty-one years are to be computed from the death of the testator. In this case there could be no accumulation until the death of one of the annuitants. Besides, there is no direction to accumulate. It so happened that, after the expiration of the twenty-one years, there was some accumulation; and the question is whether the statute applies to an *accidental* accumulation.

Mr. Temple, Mr. K. Parker, Mr. James Parker, Mr. Wray, Mr. Spurrier, Mr. Stinton, and Mr. T. H. Hall appeared for the other parties, but

The VICE-CHANCELLOR, without hearing them, said

The question comes to this: whether the will contains a specific direction to accumulate, or not? Now I do not see a word about accumulation except in the direction to sell and dispose of the securities on which the 3,300*l.* should be invested, and to pay the money arising therefrom and also the proceeds arising therefrom, and also the proceeds which should have accumulated in respect thereof. But that is not a *direction* to accumulate. It is nothing more than an incidental observation on the possibility of there being an accumulation. The same remark may be made with respect to the subsequent passage, where the testator speaks of the interest and dividends which shall have accumulated.

It may be true that there has been an accumulation; but it is the result, not of any direction given by the testator, but of chance; and I think that the statute does not apply to an accidental accumulation.

In *The Attorney-General v. Poulden* there was an *express direction* to accumulate.

His *Honor* concluded by observing that the Thelluson Act had never been considered to be well drawn.

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Second Cousins.

Will.

Construction.

Another question in this case was whether the party for whom Mr. *Wray* appeared, and who was first cousin once removed to the testator, was entitled to a share of the fund bequeathed in trust for his second cousins.

Mr. *Wray* said that his client stood in the same degree of relationship to the testator as his second cousins did; and that he had not used the word, "cousin," correctly, throughout his will; for, in one part of it, he had called persons who were not related to him at all, "his cousins."

Testator bequeathed a fund in trust for his second cousins.

Held that a first cousin once removed was not entitled to a share.

The VICE-CHANCELLOR:

I am bound by the words which I find in the will. Those only who have either the same great grandfather or the same great grandmother, are second cousins to each other. The testator may have called some persons his cousins who were not so; but that only shews that he made a mistake as to them. My opinion is that those only who stood in the relationship of second cousins to the testator, are entitled to share in the fund (*f*).

(*f*) See *Sanderson v. Bayley*, 4 Myl. & Cr. 56.

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22nd March.

Evidence.

Lost Deed.

Evidence of the loss of a deed, and of its contents, though not strictly formal, held to be sufficient.

GREEN v. BAILEY.

THIS was a suit in the form of a creditor's suit, by some of the *cestuis que trust* under the marriage settlement, dated in 1782, of *Thomas Abbott Green*, deceased, against his executor and the other *cestuis que trust*. The object of it, as far as the Plaintiffs were concerned, was to have 3,592*l.* Consols, which the trustees had sold out and paid the proceeds of to *Thomas Abbott Green* in his lifetime, replaced out of his estate. The trustees were not represented on the record, because, as the bill alleged, they were dead, and the Plaintiffs were unable to discover their personal representatives.

The settlement was stated to be lost; and the questions at the hearing were whether a sufficient search was proved to have been made for it, to admit of secondary evidence being given of its contents; and whether the secondary evidence that had been given, was satisfactory.

The bill, after stating the settlement, the purchase of the Consols and the sale of them and payment of the proceeds to *Thomas Abbott Green* in 1800, alleged that he lent them, together with a further sum of his own, amounting to 5,500*l.* in the whole, on a mortgage made to him by *William Beckford*, Esq., and that, after receiving the interest from time to time, he was repaid the principal in 1804, and applied the whole of it to his own use; that he made a will in the lifetime of his wife (who died before him), dated the 23rd of November 1832, and which, though superseded by a later will, was still in

existence as a document signed by him, and was amongst his papers at his death; and that it was as follows:—
 “Whereas, in pursuance of the settlement made upon my marriage with my said wife, the sum of 2,300*l.* was invested by me in the purchase of 3,500*l.** Consols in the joint names of *Samuel Davis* and *John Mason* (both since deceased) in trust to pay the dividends and interest thereof to me for my life, with remainder to the issue of the marriage in manner in the said settlement mentioned†; and whereas the whole of the said trust stock was, some years since, at my request, sold out by the said trustees, and the produce thereof paid to me upon my engagement to replace the same whenever I should be required so to do by the said trustees, but the same never having been yet replaced, it is my will and I hereby direct my executors hereinafter named, by and out of the first monies which shall come to their hands, to purchase, in the names of themselves and such other person or persons as my wife shall think proper to name, the like sum of 3,500*l.* Consols; and I direct that my said executors and the person or persons to be so named by my said wife as aforesaid, shall stand possessed of the said stock upon the same trusts and to and for the same ends, intents, and purposes as are mentioned and declared in my said marriage settlement, of and concerning the trust-stock therein mentioned, or such and so many of them as shall be then subsisting and capable of taking effect, and shall, thereupon, by deed for that purpose, declare the trusts thereof accordingly.” The bill further stated that the testator’s wife named in his will, died in March 1836, and that he died in November 1844, having made his *last* will dated the 18th of November 1840,

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* This was a mistake for 3,592*l.*

† See *Green v. Bailey*, *ante*, Vol. XIV., page 635.

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and thereof appointed the Defendant, *Bailey*, sole executor: that the settlement was placed in the care of the trustees, and the Plaintiffs had caused inquiry to be made for it, but it could not be found, and the Plaintiffs believed that it was lost; but that the testator had in his possession at his death, *a copy of the original draft of the settlement*, and respecting which the testator made a memorandum in his account book, to the effect that the draft of his marriage settlement was in a tin box in his possession, and that the original was in the possession of Mr. *Mason*.

A witness, who was the executor of *Samuel Davis*, the son and successor in business of *Samuel Davis*, solicitor, one of the trustees of the settlement, deposed that he had caused search to be made for the settlement, and had, himself, assisted in searching for it and for any papers connected with it; but he did not, nor, to the best of his belief, did any person whom he had employed to make the search, find any deed purporting or appearing to be the settlement, or any draft or copy of it, or any extract from it; and that, to the best of his belief, there was not any book in his custody relating to the business of *S. Davis*, the father.

The person *employed* to search, deposed that he had been unsuccessful, and that he had examined the bill-books of *S. Davis*, the father, but had not found any entry in them relating to the settlement, or to any business connected with it.—Another witness proved that he had searched amongst *the papers in the possession of a gentleman who was Mason's executor, and that he found some which appeared to have belonged to Mason*, but was unable to find the settlement or any draft or copy of it, or any paper connected with it.—*Thomas Abbott Green's* second wife deposed that he had not any papers in his

house at his death, except bills, letters, and papers of that kind; and that she never knew nor ever heard of the settlement. The solicitor for the Plaintiffs swore that he had made inquiries of several solicitors who had been occasionally employed by *T. A. Green*, and of several members of his family and several of his personal friends, but had not been able to obtain any intelligence as to the settlement.—Another witness deposed that the document alleged to be a copy of the original draft of the settlement, and the account book before mentioned, were, to the best of his knowledge and belief, found by *Robert Green*, one of the Plaintiffs, in a tin box belonging to his grandfather, *Thomas Abbott Green*, the testator (who had been a silversmith in *Cockspur-street*), a few months after the testator's death, under the following circumstances:—"One day as I was attending, as usual, in the front-shop in *Cockspur-street*, *Robert Green* called me into the counting-house. A tin-box, in which I knew that *Thomas Abbott Green* used to keep private papers, was then open before *Robert Green*, and he produced to me the exhibit marked B. (the alleged copy of the draft of the settlement), and stated that he had just found it in the box, and spoke of it as being his father's settlement. I, at the same time, saw in the counting-house the produced book marked E. (the account book), but whether it was lying in the box or outside it with other papers, I do not recollect. I have no doubt, however, that the produced book was either lying in the box or had just been taken out of it by *Robert Green*. I believe, too, that it was in the tin-box at *T. A. Green's* death; for I had been accustomed to see it there in his lifetime, when I have brought the box to him and he has put papers into it in my presence. I did not further examine the contents of the box on the said occasion after his death. There were several papers in it

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at the time of my being called in as aforesaid by *Robert Green*, and there were others lying beside it which appeared to have been just taken out of it, but of what they consisted I have no knowledge. The tin-box was usually kept by *T. A. Green* in an iron safe, and it was deposited there at the time of his death; and I believe that *Robert Green* had caused it to be brought from thence into the counting-house at the aforesaid time of his calling me to be a witness to the finding of the produced documents." The same witness further deposed that he saw another document marked F. on the aforesaid occasion of his being called into the counting-house by *Robert Green*; and that it was then either lying in or by the side of the tin-box, and he had no doubt that it was part of the contents of the box at *T. A. Green's* death; and he believed that he had seen it in the box in *T. A. Green's* lifetime.—That document was a deed-poll, by which *T. A. Green's* first wife, by virtue of a power reserved to her by the settlement, appointed 500*l.* to *T. A. Green*. It recited the settlement; but the recital did not quite accord with the contents of the alleged copy of the draft of the settlement. The last-mentioned document appeared to have been signed by counsel, and an engrossment appeared to have been made from it, for the blank for the date was filled up, and the words "first skin, second skin, first skin of counterpart, &c." were written in the margin of it. The account book contained two entries in the testator's handwriting, one to the effect that a copy of his marriage settlement was in a tin-box in his possession, and the original in the possession of *Mr. Mason*; and the other, that the 3,592*l.* Consols had been sold out, by the trustees, on the 3rd of May 1800, and the proceeds, amounting to 2,259*l.* cash lent to the testator, and that he had advanced that sum, together with monies of his own, to *Mr. Beckford*.

Mr. *James Parker* and Mr. *Hetherington*, for the Plaintiffs, cited *Ward v. Garnons* (a), and *Skipwith v. Shirley* (b).

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Mr. *Bacon* and Mr. *Stevens*, for the Defendant, *Bailey*, the executor of *Thomas Abbott Green*, said, first, that a sufficient search had not been made for the settlement; for the papers belonging to *Mason's* solicitor had never been searched, and that no search at all had been made for the counterpart. Secondly, that the draft was not proved to have been found amongst the papers, or in the repositories of *Thomas Abbott Green*; for all that the evidence on that head amounted to, was that *Robert Green* said that he had found it in the tin box; that the paper referred to by the entry in the account-book was a *copy*, not a draft; and therefore there was nothing to identify the draft with the settlement that was executed; and moreover that there was a variance between the contents of the draft and the recital of the settlement in the deed-poll.

Mr. *Bethell*, Mr. *Stuart*, Mr. *Elderton*, and Mr. *Bevir*, appeared for the other Defendants.

THE VICE-CHANCELLOR:

I think that it is sufficiently proved, as against the executor of the testator, that there was a settlement. We have the fact of the testator himself reciting by that will, (which, though inoperative as a will, the executor admits to have been signed by the testator), that there was a settlement; and reciting, not that fact merely, but also that: "the whole of the said trust-stock was, some years since, at my request, sold out by the

(a) 17 Ves. 134.

(b) 11 Ves. 64.

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said trustees, and the produce thereof paid to me, upon my engagement to replace the same whenever I should be required so to do by the said trustees." So, that general fact is conclusively proved as against the executor. Besides that, we have the entry in the testator's account-book, shewing that there was such a transaction; shewing how the money was dealt with, and what became of it in its accumulated form, namely, that the testator lent the whole to Mr. *Beckford*. Also, there is a reference, in the same book, to the fact of there being, in the testator's tin box, a copy of his marriage settlement, and to the original being in Mr. *Mason's* possession.

It is true that the paper produced appears not to be a copy, but what is technically termed a draft, from which the marriage settlement was engrossed. I can, however, easily understand that a person not conversant with the law, might mean to describe, as a copy, a document, which, though not a copy, was the document from which the instrument that was executed was engrossed, the contents of which, therefore, would tally with the contents of the executed instrument.

Then it does appear that search has been made, to a certain extent, for the original; although, of course, not successfully.

I admit that there is some degree of weight to be attributed to Mr. *Bacon's* observation that there is no direct proof, by means of witnesses, of the finding of the tin box, nor of what were the contents of it when first found. But a tin box was produced to one of the witnesses, who states that one of the Plaintiffs told him that the draft had been found in the box. I suppose

that the box had been opened, and the draft found in it; and both the draft and the box were produced to the witness. It is true that that might have been carried further. But then you find a tin box in which the draft was, [was *said* to be—*qu.*]; and you find a draft which it is reasonable to presume the testator referred to under the name or title of a copy; and you find the fact of his reciting that there was a settlement.

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I observe that there does seem to be some degree of variance between the words in the draft, which give the power of appointment, and the recital of the power in the deed-poll by which it was exercised. I cannot, however, but think that there must have been a mistake in reciting the terms of the power. At all events, it is perfectly plain that the instrument itself professes to be an execution of the power given by the marriage settlement.

Then, nothing is set up as being the contents of the marriage settlement beyond that which appears in the draft. And, that being the case, I think that there is sufficient to satisfy the Court that the limitation of the trust-money was as it stands in the draft, there being no suggestion that it was otherwise.

Therefore, on the whole, it appears to me that there is quite sufficient to justify the Court in saying that the Plaintiffs are creditors as against the assets of the testator, for the amount of the stock, and, of course, for the dividends subsequent to the testator's death.

1847:

13th February.

*Vendor and
Purchaser.**Title.**Evidence.*Evidence as to
the heirship of
daughters.

HEMMING v. SPIERS.

THIS was a suit for specific performance, by the vendor of an estate against the purchaser. The Plaintiff deduced his title to the estate from *Elizabeth* and *Charlotte Horsfall*, as being the co-heirs of their father, *William Horsfall*, who died in 1823, and had had a son. On the argument of exceptions to the *Master's* report approving of the title, it was contended, on behalf of the Defendant, that the evidence given by the Plaintiff, to prove the heirship of the two ladies, was not satisfactory.

That evidence consisted of two statutory declarations, one, made by a solicitor named *Geldart*, stating that, shortly after 1801, he was professionally employed by *William Horsfall*, and became well acquainted with him and his affairs and family; and that he often heard *William Horsfall* speak of the latter, and always understood that he had, by his wife, three children, a son and two daughters; and that *Geldart* believed that the son died shortly before his acquaintance with the father commenced, the family being then in mourning, as he was informed, for that son, and who, as he was also informed, was never married. The other declaration was made by *Henry Wakefield*, a surgeon: it stated that *Wakefield* attended *W. Horsfall* in his last illness; and, about a week before his death, suggested to him the propriety of settling his worldly affairs; that he replied that it was not necessary for him to make a will, for the law would make one for him; for that he had two daughters, and his property would be divided between them.

Mr. *Stuart*, and Mr. *C. Barber*, appeared in support of the exceptions, and

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Mr. *Willcock*, in support of the report.

The VICE-CHANCELLOR said that it appeared, from Mr *Wakefield's* declaration, that, in 1823, *William Horsfall* was satisfied that his family consisted of but two daughters; and, therefore, there was satisfactory evidence that his son was then dead: and that it must be presumed that the son was not married, for there was no evidence that he was so.

Costs.

Exceptions.

Another question raised by the exceptions, related to the title to an outstanding term. The Defendant's counsel was prepared to argue that question, but admitted that, since the recent act relating to satisfied terms (8 & 9 Vict. c. 112), it had become of no consequence. He submitted, however, that, as the report was made before the act came into operation, the Defendant would be entitled to the costs of the exceptions, if it should appear that the *Master* was wrong.

Exceptions to a report were taken before, but were set down for argument after an act of Parliament came into operation which rendered the question raised by them of no importance.

The VICE-CHANCELLOR ruled that, as the exceptions had been set down after the act came into operation, they must be overruled, and the Defendant must pay the costs of them.

Held that the exceptant must pay the costs of them.

1847:
23rd and 25th
March.

Patent.

The doctrine laid down by the Court of Exchequer, that, if a patent has been infringed unintentionally, the patentee is not entitled to redress, disapproved of.

HEATH *v.* UNWIN.

THE bill was filed for an injunction to restrain the infringement of a patent which the Plaintiff had obtained for an improved method of manufacturing steel by using a substance, called carburet of manganese, in the process. Before he filed the bill, he had brought an action against the Defendant, in the Court of Exchequer, for infringing his patent, and had obtained a verdict; but liberty was given to the Defendant to move to enter a verdict for himself on the plea of not guilty. The Defendant moved accordingly, and, ultimately, but not until after the filing of the bill, the rule *nisi*, which he had obtained under the leave given to him, was made absolute, the learned Barons being of opinion that, as the Defendant had never used, or meant to use the substance called carburet of manganese in manufacturing steel, he had not infringed the Plaintiff's patent directly; and that he had not infringed it indirectly, because, though he had used two ingredients which, when fused, would combine together and form carburet of manganese, he was not aware, at the time, that they would form that substance (a).

Mr. *Bethell* and Mr. *Chichester* now moved for the injunction,

Mr. *Walker* and Mr. *Rolt*, for the Defendant, said that the Plaintiff had ultimately failed in his action, and therefore the bill ought to be dismissed.

(a) See *Heath v. Unwin*, 13 Mees. & Wels. 583.

Mr. *Bethell*, in reply, said that the infringement of the patent had been established by the verdict in the action, and that the doctrine, promulgated by the Barons of the Exchequer, that an unintentional imitation of a patented invention is not an infringement of the patent, was a novel doctrine, and that the *Lord Chancellor* had disapproved of it in a recent case of *Stevens v. Keating* (b). He referred also to *Kay v. Marshall* (c).

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THE VICE-CHANCELLOR:

This case has been brought before me under novel circumstances. I do not recollect any one similar to it, unless the case of *Kay v. Marshall* can be considered as a precedent.

It strikes me that what is stated to have been the foundation of the judgment of the Barons of the Exchequer, when the motion to make the rule absolute was before them, is fraught with the most dangerous consequences to any Plaintiff who complains of a civil injury. I admit that, in criminal cases, the *animus* with which the act complained of was done, is very properly regarded; but I am at a loss to see how the want of intention can be any answer where the act complained of is a civil injury. The party complaining of the act is not the less prejudiced by it because it was committed unintentionally; and my opinion is that, if a party has done an act that is injurious to the rights of another (though without any intention of doing him an injury), he is answerable for the consequences. In *Stevens v. Keating*, the *Lord Chancellor* disapproved of the case in the Court of Exchequer; and I must decline to act upon the principle which it lays down.

(b) The reporter was unable to find any report of this case.

(c) 1 Myl. & Cr. 373.

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Having regard to all the circumstances of the case and to the opinion expressed by the *Lord Chancellor*, the order that I think ought to be made on this motion, is that the bill be retained for twelve months, and that the Plaintiff be at liberty to bring such action as he shall be advised, and that the motion do stand over*.

* Reg. Lib. A. 1846, fo. 1108.

1847:
26th March.

HYDE v. NEATE.

Debt.
Will.
Construction.

Testator gave *J. P.* and *I. P.* 10 *l.* each for mourning, and 100 *l.* to *J. T. N.* his executor, for the trouble he would have in the execution of the will. By a codicil, he gave legacies to other persons, and directed that if they or any other person

who had a legacy left them by any will, should owe him any sum or sums of money at his decease, it should be considered as part of their legacy. At the testator's death, *J. T. N.* owed the testator 4,000 *l.*, and two of the other legatees also owed him sums much greater than their legacies.

Held that the testator intended to remit their debts, as well as to give them their legacies.

THOMAS PICKARD, by his will, dated the 27th of March, 1835, directed his trustees therein named to buy and purchase, or set apart and appropriate sufficient funds to provide for the payment of an annuity of 50 *l.* to *Mary*, the wife of *John Bryan*, for life, and also of an annuity of 50 *l.* to *Elizabeth*, the wife of *William Adcock* the elder, for life; and he declared that those annuities should be for the sole and separate use and benefit of the said *Mary Bryan* and *Elizabeth Adcock* respectively. He then gave to *Mary Pickard*, 10 *l.* for mourning; to *Mary Bryan*, 12 *l.* for mourning; to each of his half brothers and sisters, *Sarah Ecob*, *Joseph Pickard*, *Hannah Collin*, and *John Pickard*, the sum of 10 *l.* for mourning; to each of his nephews and nieces

the sum of 5*l.* for mourning; to his friends, *Benjamin Brookhouse* and *John Thomas Neate*, the legacy or sum of 100*l.*, for the care and trouble they would have in the execution of the trusts of his will. And he appointed *Ann Hyde*, *Benjamin Brookhouse*, and *John Thomas Neate* executors of his will.

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The testator made a codicil dated the 16th of October 1839, in the words following:—"Codicil to my will dated the 27th March 1835. I have left to my sisters *Mary Bryan* and *Elizabeth Adcock* 50*l.* per annum for their natural lives. I now, by this codicil, renounce their legacies, and, in lieu of the same, give to each of them, to their sole use and interest, 200*l.*, to be paid within six months after my decease, and their receipt shall be a full discharge to my executors; but should they or any other person who have a legacy left them by any will, owe me any sum or sums of money at my decease, it shall be considered as a part of their legacy; and I hereby authorise my executor or executors to use all monies owing to my estate to be paid within six months after my decease, if they shall think proper. And I hereby appoint *Joseph Brookhouse*, son of my executor *Benjamin Brookhouse* (to whom I give 100*l.*), an additional executor to my said will."

John Thomas Neate owed the testator 2,000*l.* at the date of the codicil and 2,000*l.* more, with an arrear of interest, at the testator's death; and *John Pickard* and *Joseph Pickard* were, respectively, indebted to the testator, at his death, in sums considerably exceeding the amount of their legacies. The *Master* having stated those facts, certified that, upon consideration of the will and codicil and the several matters aforesaid, he was of opinion that the testator did not, by his codicil, intend,

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and that such codicil did not operate to release or bequeath, to *John Thomas Neate, John Pickard* and *Joseph Pickard*, their several debts or sums of money due from them as aforesaid.

John Thomas Neate excepted to the report, for that the *Master* had not found that the testator had given, to the legatees who were indebted to him, the several sums of money in which such legatees were so indebted, as part of their legacies.

Mr. Bethell and *Mr. Webster*, in support of the exception, said that the persons to whom the annuities were given by the will, were married women, who could not owe the testator anything; that some of the legacies were given for mourning and the others for the trouble which the legatees would have in the execution of the will; so that all of them were either given for a specific purpose or had a particular consideration attached to them: that three of the legatees were indebted to the testator in sums considerably exceeding the amount of their legacies; and, one of them, to whom 100*l.* was given, owed the testator 4,000*l.*: that it would be absurd to suppose that the testator intended 4,000*l.* to be deducted from 100*l.*: and that the words, 'a part,' meant, 'in addition to.'

Mr. James Parker, Mr. Rolt, Mr. Tennant and *Mr. Pitman*, for the residuary legatees in support of the report, said that it was only the circumstance that the debts were larger than the legacies, that created any difficulty; that, if the debts had been less than the legacies, there could be no doubt that they would have been deducted; and an accidental circumstance could not alter the meaning of the words of a will: that the

passage in the codicil which had been relied on, commenced with, 'but,' not with, 'and;' that it contained no gift, but only a direction; and that the testator had authorised his trustees to cause all monies owing to his estate to be paid within a certain time after his decease, if they thought proper.

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HYDE
v.
NEATE.

Mr. *Bethell*, in reply, said that the other side had construed the passage in the codicil as if it had stood thus: "as part of their *said* legacy;" but the word, 'legacy,' was not confined to any particular bequest; and that the testator meant that the debt of each legatee should be considered as part of the *legatum*, or, in other words, that the debt which each legatee might owe him at his decease, should be considered as part of his testamentary bounty to that legatee.

THE VICE-CHANCELLOR:

It is manifest, from the codicil, that the testator was an illiterate person. He has used the word, 'renounce,' for, 'revoke;' and therefore, it is plain that he had no clear idea of the meaning of words.

It strikes me that there is no other mode of construing the words: "shall be considered as part of their legacy;" than this, namely, that the words, 'part of their legacy,' mean that part of the legacy is to be a remission of the debt. The language expresses accumulation of benefit. The legacy given by the will is to be one part of the benefit, and the remission of the debt, is to be considered as the other part.

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v.

NEATE.

26th June.

*Legatee.**Money paid
into Court.*

At a testator's death, *J. N.* owed him 4,000 *l.*, but claimed to be entitled to it, as bequeathed to him by the will. By an order on motion, he was ordered to pay the 4,000 *l.* into Court to an account intitled "The Disputed Legacy Account of *J. N.*," and that sum was to be invested in stock, and the dividends were to be accumulated.

At the hearing, the Court decided in favour of his claim.

Held, nevertheless, that he was entitled, not to 4,000 *l.* sterling, but only to the stock and the accumulations, although, owing to a fall in the funds, they, together, were of less value than 4,000 *l.*

At the hearing for further directions, another question arose, under the following circumstances, respecting the 4,000 *l.* which *Neate* owed to the testator at his decease.

On a motion made in the suit before the hearing, *Neate* was ordered to pay the 4,000 *l.* into Court, to the credit of the cause, to an account to be intitled "The Disputed Legacy Account of the Defendant, *J. T. Neate*," and that sum was ordered to be laid out in the purchase of 3 *l.* per Cents., in the name and with the privity of the Accountant-General, in trust in the cause, the like account," and the dividends to accrue on the stock, were ordered to be accumulated. Between the paying in of the 4,000 *l.* and the hearing of the cause for further directions, the funds fell considerably; and the Court having decided that *Neate* was a legatee of the debt, his counsel now contended that he was entitled to be paid 4,000 *l.* sterling.

But the Court held that, as the 4,000 *l.* had been paid in to a distinct account, it was ear-marked; and, therefore, *Neate* was entitled only to the stock which had been purchased with the 4,000 *l.* and to the accumulations of the dividends, although the stock and the accumulations together were less in value than 4,000 *l.*

SCOTT v. PASCALL AND ADAMS.
PASCALL AND ADAMS v. SCOTT.

1847:
29th March.
20th and 22nd
April.

IN October 1837, *Scott* executed to *Pascall* and *Adams*, two of the guardians of the poor of *St. James's Clerkenwell*, in trust for the parish, a mortgage for 10,000*l.*, being the amount of monies belonging to the parish, which he was alleged to have applied to his own use, during the time that he had been one of such guardians. In 1838 *Scott* filed the bill in the first suit, to set aside the security, on the ground that it had been obtained by duress. Shortly afterwards *Pascall* and *Adams*, on behalf of themselves and the other guardians, filed the bill in the second suit, to enforce the security. In November 1842, a decree was made in both the suits, directing an account to be taken of what was justly due from *Scott* to the parish, at the date of the mortgage, and that the mortgage should stand as a security for what should be found due on taking that account; and the costs of the suits were reserved until the *Master* should have made his report.

In the course of the proceedings before the *Master* under that decree, *Pascall* and *Adams* proposed to examine *E. Scargill*, *vivâ voce*, as a witness on their behalf. On his being examined on the *voir dire*, it appeared not only that he was one of the guardians when the second suit was instituted, but that he had concurred with other persons in procuring the institution of it, and had taken an active part in it after it was commenced. But it appeared also that he ceased to be a guardian in September 1841, and that, in November following,

Witness.
Evidence.
Competency.

A suit was instituted by *A.* and *B.*, two of the guardians of the poor of a parish, on behalf of themselves and the other guardians, to enforce payment of money for the benefit of the parish.

Held that *S.* was a competent witness for the Plaintiff, notwithstanding he was one of the guardians when the suit was instituted, and was interested in the result of it as a parishioner when he gave his evidence.

Costs.

Where Plaintiffs sue on behalf of themselves and others, the persons on whose costs of the suit.

behalf they sue are not liable to the

1847.

SCOTT
v.
PASCALL.

Mr. *Selby*, the solicitor who had been employed by *Pascall* and *Adams*, was paid his bill of costs, and another solicitor appointed in his place. The *Master*, however, considered that *Scargill* was interested in the result of the suit, and rejected him as a witness; and, notwithstanding *Pascall* and *Adams* afterwards released him from all liability in respect of the costs of the suits or any matter connected with the suits, the *Master* was still of opinion that he was an incompetent witness; because, if the second suit should turn out to have been improperly instituted, he would be liable to an information by the *Attorney-General* on behalf of the parishioners at large, for having been accessory to an improper application of the parish funds*.

A motion was now made, on behalf of *Pascall* and *Adams*, that the *Master* might be directed to receive *Scargill* as a witness.

Mr. *Teed* and Mr. *Rogers*, in support of the motion, said that, though the bill in the second suit was filed by *Pascall* and *Adams* on behalf of themselves and the other guardians, yet the Plaintiffs on the record and not the parties on whose behalf they sued, would be liable to the costs; besides which, *Scargill* had ceased to be a guardian, and the solicitor who conducted the suit during his guardianship, had been changed and paid his bill; that, although *Scargill* might become liable to contribute to the costs, as a rated inhabitant of the parish, his incompetency on that account was removed by 3rd & 4th Vict. c. 26, (to remove doubts as to the competency

* The 6 & 7 Vict. c. 85, which renders an interested witness a competent one, does not apply to suits commenced before the passing of it, namely, the 22nd August 1842.

of persons, being rated inhabitants of any parish, to give evidence in certain cases). They relied also on the release, and added that liability to a possible suit had never been considered as an objection to the competency of a witness.

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SCOTT
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PASCALL.

Mr. *Bethell*, Mr. *Stuart*, Mr. *Parry*, and Mr. *Daniel*, in opposition to the motion, said that *Scargill* was one of the concoctors and originators of the suit, and was virtually a plaintiff in it; that he signed the report in pursuance of which the suit was instituted; and therefore it was ridiculous to say that he had escaped from the costs of it by ceasing to be one of the guardians and becoming (as he had done) clerk to them; that the release was wholly insufficient to discharge *Scargill's* liability; for, in order to have that effect, not only *Pascall* and *Adams*, but all the other inhabitants of the parish, ought to have executed it; and that, whether the suit was successful or unsuccessful, *Scargill* was interested in the result of it, as a parishioner, and therefore the *Master* had rightly rejected his evidence.

THE VICE-CHANCELLOR:

It appears to me that Mr. *Scargill*, independently of the fact of his being a rate-payer, is in no way whatever liable to the costs of the suit. Mr. *Selby*, who was the solicitor first employed in the suit, has been paid his costs. He has ceased to be such solicitor, and the person now carrying it on, is carrying it on under some authority from those who employ him, and looks to those gentlemen to be paid his costs.

Besides, I cannot comprehend the proposition that Mr. *Scargill*, who is not a party to the record, can by any means be made liable to the costs of the suit.

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 SCOTT
 v.
 PASCALL.

It appears to me, also, that if the guardians recover the fund, it will be disposed of by them as guardians. It is true that the recovery of it may tend to the benefit of the present and future rate-payers, because all that is recovered will be either a *bonus* to them, or will go to pay off their losses. But I do not think that *Scargill* can, in any way, be considered as a person having any interest in the matter, except as a rate-payer: and the act of 2nd & 3rd Vict. c. 26, has declared that he shall be a competent witness notwithstanding he sustains that character. The consequence is that I shall direct the *Master* to receive him as a witness*.

* A motion to discharge the *Vice-Chancellor's* order, was refused by the *Lord Chancellor* with costs: 2 Phill. 390.

1847:
 30th March.
 Insolvent
 Debtor.

BRUCE v. CHARLTON †.

ON the 20th of March 1846, the *Vice-Chancellor* made an order in this suit, directing that 37*l.* 15*s.* 5*d.*, part of a sum of 666*l.* 13*s.* 4*d.* which was standing in the name of the Accountant-General, should be paid to one *Ellen Gould*.
A. filed a petition in the Insolvent Debtors' Court, with a view to obtaining the benefit of the act. Shortly afterwards an order was made, in a suit, for payment of a sum of money to her out of Court. After the Insolvent Court had made an order vesting all her property in the provisional assignee, but *before it had made any adjudication respecting her*, she died. After her death a creditors' assignee was appointed.

Held that notwithstanding there had been no adjudication, the assignee, and not the administrator of *A.*, was entitled to the sum in Court.

† *Ex relatione.*

On the 12th of February preceding, *Ellen Gould* had filed a petition, for the purpose of obtaining the benefit of the Act for the Relief of Insolvent Debtors, (1 & 2 Vict. c. 110). On the 11th of March she was heard on her petition, but, in consequence of ill health, she was remanded. Some time in the April following, the usual order was obtained for vesting the whole of her real and personal estate in the provisional assignee of the Court. She died on the 14th July 1846, before any adjudication had taken place on her petition; and administration to her estate was granted to her son, *Henry Gould*.

1847.
—
BRUCE
v.
CHARLTON.

On the 21st of September 1846, *George Walker* was appointed creditors' assignee, under the powers contained in the act; and, as such, he presented a petition in the suit to have the 37*l.* 15*s.* 5*d.* paid to him.

Mr. *T. C. Wright* appeared in support of the petition.

Mr. *Glasse*, for *Henry Gould*, the administrator of *Ellen Gould*, opposed the application.—He said that the estate never vested in the creditors' assignee; for there had been no adjudication in the lifetime of *Ellen Gould*, and none could be made after her death; and therefore the whole proceeding in the Insolvent Debtors' Court, fell to the ground*: that this view of the law accorded with the terms of the analogous statute of the 6 Geo. 4, c. 16, by which, if a bankrupt died before adjudication, the fiat abated.

THE VICE-CHANCELLOR:

That is by virtue of a special provision in the Bank-

* See the 37th, 44th, and 75th sections of 1 & 2 Vict. c. 110.

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BRUCE
v.
CHARLTON.

rupt Act. I do not see a similar clause in the Insolvent Debtors' Act; and I must say that I cannot see anything in it that controls the force of the 44th section. Therefore, I think that the words of the 37th section must have their operation, and that the whole of the insolvent's estate is vested in the assignee.

Order made according to the prayer of the petition.

1847:
30th March.

*Taxation.
Solicitor and
Client.*

COOPER v. EWART.

Under the common order for taxing a solicitor's bill, the *Master* ought to take an account of sums received by the solicitor for his client, in the character of solicitor, and which are connected with the items of the bill. But the *Master* ought not to take, under that order, a general account between the parties; and, consequently, the decision to the contrary, in *Russel v. Buchanan*, ante, Vol. IX., page 175, was erroneous.

THE Plaintiffs had obtained, as of course, the common order at the Rolls, for taxing the bills of Messrs. *Brooks & Cooper*, their solicitors. It ordered *Brooks & Cooper* to deliver to the Plaintiffs, within a month after notice of the order, a bill of all such fees and disbursements as they claimed to be due to them in the cause and in all causes, suits and matters in which they had been employed as the attornies or solicitors of the Plaintiffs, of which no bill had been already delivered: and it directed the *Master* to tax such bill, together with the bills already delivered; and that, upon the Plaintiffs paying *Brooks & Cooper* what should appear to be due on the taxation, or, in case it should appear that the bills had been already paid, *Brooks & Cooper* should deliver, to the Plaintiffs, on oath, all deeds &c. in their or either of their custody or power belonging to the Plaintiffs; and, in case it should appear that the

bills had been overpaid, then that *Brooks & Cooper* should refund and pay, to the Plaintiffs, what the *Master* should certify to have been so overpaid.

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COOPER

v.

EWART.

The *Master* acted upon the order; but, in so doing, did not take an account contained in the schedules to the solicitors' examination; because he conceived it to be a *general account*, and that, therefore, the order did not authorize him to take it.

Upon the hearing of a petition, presented by the Plaintiffs, and praying that the *Master* might be directed to review his taxation, the question was whether the *Master* ought or ought not to have taken the account.

Mr. *Bethell* and Mr. *Roundell Palmer*, in support of the petition, said that the account was not a general account of dealings and transactions between *Brooks & Cooper* and the petitioners, but consisted of sums which *Brooks & Cooper* had received and paid, in their professional character, on account of the petitioners, and the items of it were connected with the bills of costs; and, therefore, the *Master* ought to have included it in his taxation, and, if he had done so, he would have found that *Brooks & Cooper* had been overpaid to the amount of 2,301*l.*: *In the matter of Aithen* (a), *In the matter of Barker* (b), *Jones v. James* (c).

Mr. *Cooper* and Mr. *Chandless*, for the Respondents, said that some at least of the sums contained in the account, were not connected, in any manner, with the

(a) 4 Barn. & Ald. 47.

(b) *Ante*, Vol. VI., page 476.

(c) 1 Beav. 307.

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bills of costs, nor had they been received, by *Brooks & Cooper*, in their professional character; and that, under the common order for taxing a solicitor's bills, the *Master* could not take a general account of pecuniary transactions between a solicitor and his client, unless there was an agreement between them, either express or implied, that the sums received by the solicitor should be applied in liquidation of his costs. In support of that proposition they referred to *Anon. (d)*, *In the matter of Smith (e)*, and to *Jones v. James*. They added that the opinion expressed by his *Honor*, in *Russel v. Buchanan (f)*, before he had consulted the *Masters*, namely, that a general account between a solicitor and his client cannot be taken under the common order, was correct; and that the order for taking such an account, which his *Honor* made in that case after consulting the *Masters*, had been corrected on appeal.

THE VICE-CHANCELLOR:

Although it is perfectly true that, under the common order, an account cannot be taken of matters in which a solicitor has acted for his client, not in the character of a solicitor, yet, where it appears that, in a variety of transactions, the solicitor has been acting in the character of a solicitor, and, in that character, has received sums of money for his client, and has actually charged his client for the very business done in respect of the receipt of those sums of money, it would be a strange violation of justice to say that he should be at liberty to keep the amount of the sums he had so received, in his pocket, as constituting a general debt due from him to his client, and that the client should not have the right

(d) 2 Vez. 452.

(e) 4 Beav. 309.

(f) *Ante*, Vol. IX., page 167.

to say that the sums received were properly applicable, by the solicitor, to the payment of the bill of costs. That would be introducing a rule which would work very great hardship on those who employ solicitors, and who, all along, suppose that, by the receipt of money, the bill of costs is in a state of liquidation.

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I think the proper way is to refer it back to the *Master*, to review the taxation; and I must declare that, in acting on the order made for taxation, the *Master* is to have regard to the sums of money which were received by the solicitors, in their character of solicitors, on behalf of the petitioners, their clients*.

* Affirmed by the *Lord Chancellor*, see 2 Phill. 362.

GATTLAND v. TANNER.

ON the hearing of exceptions to the *Master*'s report as to the sufficiency of an answer in this cause, the same question arose, as in *Mason v. Wakeman* (a), relative to the 38th General Order of August 1841; and his *Honor* said that he remained of the same opinion respecting that order, as he had expressed in the case referred to.

1847 :
26th April.
New Orders.
Answer.
Defendant.
Insufficiency.

It will be seen, however, on referring to the *memoranda* at the foot of page 478, *ante*, and to 2 Phill. 516, that his *Honor*'s decision in *Mason v. Wakeman*, was reversed by the *Lord Chancellor*.

If a bill is wholly demurrable, the Defendant, if he answers it, must answer fully.

Mr. *Bethell*, Mr. *Cooper*, Mr. *Lewin*, and Mr. *Miller*, were the counsel in the principal case.

(a) *Ante*, page 374.

1847:
 26th April.

*Executor and
 next of kin.
 Residue undis-
 posed of.*

MAPP v. ELLCOCK.

SAMUEL HENRY PARE, a barrister in *Barbadoes*, died in October 1789*, having made his will in the following words :

A testator bequeathed all his property to *A.* upon certain trusts, (but which were not co-extensive with his interest in the property), and, by a clause at the end of his will, appointed *A.* executor of it.

Held that *A.* was not a trustee of the interest undisposed of for the testator's next of kin; but was entitled to it beneficially.

“ Imprimis, I give all my estate, both real and personal, in this island, to *Edward Ellcock*, Esq., his executors, administrators or assigns, *to and for the several uses, intents and purposes following*, (that is to say) out of the rents, issues and profits, and interest of all debts due to me, to pay, unto my dear wife, *Anna Maria*, 300*L* yearly and every year, in addition to her own fortune which survives to her; and in trust, likewise, to permit and suffer her to have the full enjoyment of the uses and services of all my Negro slaves, except *Jackey*, whom I direct to be freed at the expense of my estate; and in trust, also, to permit and suffer her to use all my household furniture and plate during her natural life; and in trust, also, to receive the interest only of the debt due to me from *John Prettejohn*, Esq., during the lives of the said *John Prettejohn* and the lives of his son and daughter *Charlotte Prettejohn* and *John Prettejohn*, jun.; and in trust, likewise, to discharge the said *John Prettejohn* from the sum of 2,500*L*., which sum I bequeath unto his two children, the aforesaid *Charlotte Prettejohn* and *John Prettejohn*, and, in case of their death, unto the aforesaid *John Prettejohn* himself; and in trust, also, to divide the remainder of the

* The 11th Geo. 4 & 1 Will. 4, c. 40, for making better provision for the disposal of the undisposed-of residues of the effects of testators, applies only to testators dying after the 1st of September 1830.

interest of debts due to me, in the following manner, in equal proportions between *H. E. Holder Parris, Margaret Ellcock* and *Anna Maria Ellcock*, daughters of the aforesaid *Edward Ellcock*; and in case my said wife, *Anna Maria*, should intermarry and have children, in trust to divide the principal sums amongst such of her children as shall be living at the deaths of the aforesaid *John Prettejohn, sen., Charlotte Prettejohn* and *John Prettejohn, jun.*, and, in the mean time, to divide one principal sum of 1,500 *l.*, part of the debt due to me from the estate of the Honorable *Samuel Rous*, deceased, among and between the aforesaid *H. E. Holder Parris* and *Margaret Ellcock* and *Anna Maria Ellcock*; on the death of the aforesaid *Anna Maria*, my said wife, if there should be any doubt of the legality of the above trust for the use of the children of my present wife by a future marriage, I then give such sum or sums as would have been their share or shares, unto herself, upon such events as are before mentioned. Lastly, I nominate, constitute and appoint the aforesaid *Edward Ellcock* executor of this my last will and testament."

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The *Master* having found that the Plaintiff was the testator's sole next of kin, the cause came on to be heard for further directions. The question was whether the executor was entitled, for his own benefit, to so much of the testator's personal property as was not disposed of or fully disposed of by the will, or was a trustee of it for the testator's next of kin.

Mr. Stuart and *Mr. G. L. Russell* for the Plaintiff, said that it appeared, throughout the will, that the testator intended to give his property to the Defendant as a trustee, and not beneficially; and that, whenever pro-

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perty was given upon certain trusts, and the person to whom it was so given was, afterwards, appointed executor, that person could not take, beneficially, any interest in it that might be undisposed of, but was a trustee of such interest for the testator's next of kin: that the testator had divided his will into two parts; one commencing with the word, 'imprimis,' and the other with the word, 'lastly;' and that the Court could not unite that which the testator, himself, had severed; and that it could not hold that the Defendant took anything under the last clause in the will, without coming to the absurd conclusion that the testator intended, by that clause, to give, to the Defendant, what he had given to him before: that, in *Dawson v. Clark* (a), the testator gave all his property in trust to pay, and charged and chargeable with his funeral expenses, debts and legacies, and, afterwards, appointed those persons his executors; and Sir *William Grant*, M. R., held that they were entitled, beneficially, to what was not disposed of at all or was not well disposed of by the will; but Lord *Eldon*, C., when the case was brought before him by appeal, disapproved of the ground on which Sir *William Grant* had decided it; and, though he affirmed the decision, affirmed it upon a different ground (b): *Rhodes v. Rudge* (c), *Braddon v. Farrand* (d), *Mullen v. Bowman* (e).

Mr. *Bethell* and Mr. *Sandys* for the Defendant, the executor.

The preamble of 11 Geo. 4 & 1 Will. 4, c. 40,

(a) 15 Ves. 409.

(b) 18 Ves. 247.

(c) *Ante*, Vol. I., page 79.

(d) 4 Russ. 87.

(e) 1 Coll. 197.

states, very clearly, what the doctrine of the Courts is in cases like the present. It says: "Whereas, testators, by their wills, frequently appoint executors, without making any express disposition of the residue of their personal estate: and whereas executors so appointed, become, by law, entitled to the whole of such personal estate; and courts of equity have so far followed the law as to hold such executors to be entitled to retain such residue for their own use, unless it appears to have been their testator's intention to exclude them from the beneficial interest therein; in which case they are held to be trustees for the person or persons (if any) who would be entitled to such estate under the Statute of Distributions if the testator had died intestate." So that the law confers the legal title, to an undisposed-of residue, upon the executor, and the obligation of shewing that he was intended to be a trustee of it, is thrown upon the person or persons who wish to convert him into a trustee. But the will in the present case not only does not afford any indication of such an intention, but shews that the testator intended his executor to take, beneficially, everything that was not given to the other persons named in it. It commences with giving to the executor, by his name, all the testator's property: "to and for the several uses, intents and *purposes following*;" and, after directing the executor to pay an annuity to the testator's widow, it gives certain specific portions of the property in trust for her and for other individuals named in it; and then it concludes thus: "And, lastly, I hereby nominate, constitute and appoint the aforesaid *E. Ellcock* executor of this my last will." It cannot then be denied that the appointment of *Ellcock* to be executor of the will, was one of the purposes of it: and, *that* being so, the last clause may be read thus: "And I give all my property

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not hereinbefore disposed of, to the aforesaid *E. Elcock*, whom I appoint the executor of this my last will."

It is not necessary, however, for us to shew that the testator intended his executor to take his undisposed-of property, beneficially: all that we are required to do, is to shew that there is nothing in the will to preclude the executor from taking it. His legal title must prevail, unless the next of kin can shew that the testator intended him to be a trustee.

The case of *Griffiths v. Hamilton* very much resembles the present. There, as in this case, there were distinct gifts of specific portions of the testator's property to different individuals, and the executors were appointed by the last clause: and the Court held that they were entitled to the residue. In *Dawson v. Clark*, though the property was not given, as it is in this case, to the persons who were afterwards appointed executors, "for the uses, intents and purposes following," yet Sir *W. Grant* held that the executors took what was undisposed of, beneficially; and Lord *Eldon* came to the same conclusion. In *Pratt v. Sladden* (f) the testator called his executors, trustees, and the will contained clauses for their reimbursement and indemnity, which the will in this case does not; but, nevertheless, they were held to be entitled to the residue, beneficially.

The *Vice-Chancellor*.—It strikes me that there is this difficulty in your argument. You consider the appointment of the executor as a species of gift of the

property; the property having been given to him in the previous part of the will.

Mr. *G. L. Russell* replied.

The VICE-CHANCELLOR:

This case depends, as all cases of the same kind do, upon the language which is found in the will itself.

It is quite plain that Sir *William Grant* entertained a very clear opinion that the appointment of an executor, where it is separate, in the will, from the prior gift of the property to the person named as executor, would have the operation of giving it to the executor for his own benefit: and, therefore, in *Dawson v. Clark*, (where there was, in the first instance, a gift of all the property, to persons named, upon trust, and, afterwards, there was a separate nomination of those persons to be executors), he held that that nomination operated, in point of law, to give them everything that the testator had not given to other persons. And, though Lord *Eldon* appears to be rather against that opinion, yet it seems to me that he does not allude to the bequest precisely as it came before Sir *William Grant*, but, rather, as if it had been in a different form. He says (and it is not an opinion expressed with much confidence): "My great difficulty in this case, is not upon the effect of a devise and bequest of real and personal estate to trustees upon trusts, those trusts expressed not exhausting the whole interest: a case upon it is very difficult to maintain that, as they are afterwards named executors, they are to have what is not exhausted of the property they take as trustees*." So that his Lordship

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* The above passage is correctly copied from the report.

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does not there enter into any consideration of the subject: he does not allude to what appears, so prominently, in the report of the case before Sir *William Grant*, namely, that the effect of naming the trustees executors is, *primâ facie*, a gift to them; and these cases never would have arisen if that had not been the effect of it. Then his Lordship says: "But the difficulty I feel, is whether I am to construe the words, 'upon trust,' to mean 'charged and chargeable,' or, 'charged and chargeable,' to mean 'upon trust:'" and he ultimately decides that the persons to whom the property was given by the first clause in the will, took it subject to a charge only; and, therefore, (so far as the charge might not extend), for their own benefit; which, to say the least of it, is as fine a construction as the construction of Sir *William Grant*, that the subsequent, independent nomination of those persons as executors, operated, by itself, as a gift to them.

Sir *William Grant's* opinion has not been overruled: and we find that that learned Judge states, in a subsequent case of *Southouse v. Bate (g)*, that he adhered to the opinion which he had expressed in *Dawson v. Clark*. But I must say that I do not think that there is any considerable difference between a case in which there is a gift in trust to persons named as executors, and a case where there is a gift in trust to persons named, and those same persons are, afterwards, appointed executors, by an independent clause in the will.

With respect to the argument that was addressed to me on behalf of the executor in this case, I must say that I rather thought that his counsel were not labouring

very effectually in favour of their client, when they attempted to impose on me the necessity of taking the word, 'lastly,' and the words that follow it, as part of the original bequest. It rather seems to me that it is not so. And the effect of its not being so, is that the Court is at liberty to consider what is the effect of the testator, (after having, to a certain extent, declared the trusts), saying distinctly: "I nominate, constitute and appoint the aforesaid *E. Ellcock* executor of this my last will."

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Now the testator begins thus: "Imprimis, I give all my estates, both real and personal, in this Island or elsewhere, to *Edward Ellcock*, (describing him), his executors, administrators, or assigns, to and for the several uses, intents and purposes following, that is to say." Then there are seven different places in which he uses the words, 'in trust.' The first declaration commences in this manner: "Out of the rents, issues and profits and interest of all debts due to me:" there, it is true, the words, 'in trust*,' do not occur: but they occur seven times in the seven next sentences. Therefore I think that all the sentences which precede that which begins with the word, 'lastly,' are merely a declaration and expansion of what the testator, in the first clause of his will, calls, 'the uses, intents and purposes following.'

Then it is obvious, *on the face of the will*, that there was not an exhaustion of the whole interest in the property that was previously given: and, therefore, the testator must have been aware that he had not disposed of the whole of his property, or, rather, of the whole interest in it; and that the remaining interest in the property

* In the will, as set forth in the original bill and in a bill of revivor, those words *did* occur in the first declaration.

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was still a subject of disposition. I allude, particularly, to the trust to permit and suffer his wife to use his household furniture and plate during her life. It is plain that, as furniture and plate are not articles which *ipso usu consumuntur*, it must have been present, to the mind of the testator, that there would be an interest remaining after the performance of the trust, which might be disposed of. Then, having declared all the trusts upon which the property was given to *Elcock*, his executors, administrators and assigns, we find that the testator says: "Lastly, I nominate, constitute and appoint the aforesaid *E. Elcock* executor of this my last will." And my opinion is that the true meaning of those words, is that he should take everything that the testator had not given away, and also execute the office of executor.

That construction seems to me to be consistent with the legal import of the words, and to accord with the solemnly repeated opinion of Sir *William Grant*; and as Lord *Eldon*, whatever his inclination might be, did not think that he could reverse the decision of Sir *William Grant*, I have an express decision which I am bound to follow.

Declare that the testator's personal estate, after providing for the purposes expressed in the will, is undisposed of, and that the defendant is entitled to it, for his own benefit*.

* An appeal is pending before the *Lord Chancellor*.

WALSH v. TREVANION.

1847:
28th April.

THE issue tendered by the bill in this cause was that certain estates, the property of the Defendant and which were comprised in his marriage settlement, were included in it by mistake. The settlement (as is usual on similar occasions) was prepared by the lady's solicitor; and that gentleman was one of the witnesses in the suit. By the fifteenth interrogatory, he was asked whether some correspondence did not take place before the marriage, with reference to the settlement to be made on the part of the Defendant, the husband; and he was required to produce that correspondence.

Privileged communications.
Solicitor.

A solicitor who was examined as a witness in a suit to rectify a mistake in a marriage settlement, declined to produce certain letters, on the ground that he had received them in his character of confidential solicitor to the intended wife; and he declined to produce certain books, because they contained particulars of confidential matters between him and his clients.

He demurred to that interrogatory so far as regarded the production of any letters which he received from the lady and her mother, with reference to the settlement to be made by the intended husband; and, for cause of demurrer, said that such letters did not relate to any particular estates to be settled on the marriage, and that he received them in his character of confidential solicitor to the lady and her mother; and, therefore, he submitted that he ought not to be called upon to produce them. He demurred, likewise, to so much of another interrogatory as required him to produce any books or papers in his custody or power, containing any entry or entries relating to the settlement made or intended to be made on the part of the husband, because such books and papers contained particulars of confidential matters between him and his clients.

Held that the grounds alleged for the non-production were insufficient.

Mr. *Stuart* and Mr. *Beavan*, in support of the demurrers, said that a solicitor could not be called upon to di-

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vulge anything relating to a transaction in which he had been employed as a solicitor: *Herring v. Cloberry* (a), *Carpmael v. Powis* (b).

Mr. *Bethell* and Mr. *Willcock*, contra, said that the witness did not aver that either the letters or the books, if produced, would disclose anything that had been communicated to him confidentially by his clients, or that his clients objected to the production of them: *Duffin v. Smith* (c). They also referred to *Parkhurst v. Lowten* (d), where Lord *Eldon* said that a solicitor who demurs to an interrogatory on the ground of privilege, must be careful so to frame his demurrer that it may embody the rule of law relative to the privilege of a solicitor.

Mr. *Stuart*, in reply, said that, if the demurrer was informal, leave ought to be given to amend it: *Strathmore v. Strathmore* (e).

THE VICE-CHANCELLOR:

I can easily understand that, if this gentleman had been pressed, he might have stated what would have shewn that the subjects with regard to which he was interrogated, were altogether confidential. But the question now is, whether he has so stated in these two demurrers. [His Honor then read the first demurrer.] It appears to me that the witness has failed in stating, by this demurrer, that the letters which he refuses to produce, were of a confidential character; for it may be

(a) 1 Phill. 91.

(b) Ibid. 687.

(c) 1 Myl. & Keen, 109, cited.

(d) 2 Swanst. 194. See

202.

(e) 1 Dan. C. Prac. 936.

See also 2 Swanst. 202.

true that he received the letters in his character of confidential solicitor to the lady and her mother, and yet the letters themselves may not be confidential communications. And I think that the omission to state that they were such, is a fatal defect in a statement which is made the groundwork of an objection to answer an interrogatory.

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Then, as to the twenty-ninth interrogatory, he says that the books contain particulars of confidential communications between him and his clients. He does not say that they contain matters of confidential communication, with reference to the subject of the twenty-ninth interrogatory, between himself and the two ladies or either of them. Therefore, my opinion is that he has not, by his position of fact, made sufficient ground for protection at law (f).

(f) See *Jones v. Pugh*, 1 Phill. 96.

1847 :
29th April and
4th May.

*Railway Com-
pany.
Notice.*

A railway company being empowered by their act to take, amongst other lands, a close belonging to the Plaintiff, gave him notice of their intention to take a certain part of it; and, more than a year afterwards, they gave him notice of their intention to take the remainder. The part first taken, was intended for making the railway, and the remainder, for making a station, both of which their act empowered them to make.

Held that the power of the company with respect to the Plaintiff's close, was not exhausted by their first notice.

SIMPSON v. THE LANCASTER AND CARLISLE RAILWAY COMPANY.

IN July 1845, the Defendants, who were empowered by their act of Parliament, to take a piece of land belonging to the Plaintiff, for the purposes of their undertaking, gave the Plaintiff notice of their intention to take a certain part of it for those purposes, and, in December 1846, they gave him notice of their intention to take the remainder of it. On the hearing of a motion for an injunction to restrain the Defendants from acting upon their second notice, one question was whether the powers of the act*, so far as the Plaintiff's lands were concerned, were not exhausted by the first notice, that is to say, whether the Defendants could take part of a proprietor's land at one time, and part at another. The second notice did not state, specifically, the purpose for which the land comprised in it was required; but it appeared from an affidavit in opposition to the motion, that the Defendants required it for a station, which their act empowered them to make.

Mr. Rolt and Mr. Bagshawe supported the motion.

Mr. Bethell and Mr. Follett opposed it.

The VICE-CHANCELLOR:

I cannot accede to the proposition laid down by the counsel in support of the motion, namely, that the company, by their first notice, exhausted the power, given to them by their act, to take the land belonging to the Plaintiff which was described in the schedule to the act.

* The power to take lands, was in the usual form.

at act empowered them to make a station as well as a lway; and it seems to me that the making of the mer and the place where it should be made, are mat- s that may very well come under consideration after the ter is completed.

Motion refused, with costs.

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LOVELL v. ANDREW.

IN the hearing of an objection, raised by the answer, want of parties,

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3rd May.

Mr. Bethell and Mr. Terrell, for the Defendants, con-

New Orders.
Objection for
want of parties.

At the hearing of an objection, taken by an answer, for want of parties, the defendant is not at liberty to contend that there is any defect of parties in addition to that stated in the answer.

Pleading.—Parties.—Railway.

After a railway project had been abandoned and the directors had returned *some* of the shareholders 1*l.* 8*s.* per share, on their deposits, one of the shareholders who had received that sum, filed a bill on behalf of himself and *all* the other shareholders except the Defendants, (who were the directors), praying for an account of the receipts and payments of the Defendants as directors; that the balance which should be found due from them, might be paid into Court and applied, first, in paying 1*l.* 8*s.* per share to the shareholders who had not received that sum; and that the residue might be divided amongst all the shareholders in proportion to their shares. Two of the Defendants stated, in their answer, that the shareholders who had received the 1*l.* 8*s.* per share, received it in full satisfaction of their claims on the funds of the company.

Held that the bill ought to have been filed on behalf of the shareholders who had received the payment, and that the other shareholders ought to have been made Defendants.

Objection for want of parties.—Costs.

Although the Court allows an objection for want of parties, at the hearing under the 39th Order of August 1841, it will not order the costs of the proceeding to be paid to the defendant, but will reserve them until the hearing of the cause.

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tended that not only the persons alleged by the answer to be necessary parties, but also certain other individuals, ought to have been made parties to the bill.

The *Vice-Chancellor*, following the decision of Vice-Chancellor *Wigram*, in *Hunter v. Mackleu* (a), ruled that a defendant who has taken an objection for want of parties by his answer, cannot object, *ore tenus*, at the hearing of the objection, that any other person ought also to have been made a party, but must confine himself to the objection stated in his answer.

The bill was filed by a shareholder in a railway project that had been abandoned, on behalf of himself and all the other shareholders except the Defendants. The latter were the members of the managing committee.

It alleged that, at a meeting of the shareholders, held in January 1846, at which the abandonment of the project was resolved upon, the chairman (who was one of the defendants) stated that the Defendants would, within a week, return to the shareholders 1*l.* 8*s.* per share upon their deposits, and, as to the remainder (which was 14*s.* per share), that the Defendants would return such a proportion of it as the funds which should remain in their hands, after satisfying the liabilities of the company, would extend to pay. And that, in the course of a fortnight or three weeks, the accounts would be made up, and another meeting should then be called, at which the accounts should be laid before the shareholders.

In February 1846, the secretary to the company paid the Plaintiff and some of the other shareholders, the 1*l.*

(a) 5 Hare, 238.

8s. per share; and they, at his request, but (according to the statement in the bill) without intending to relinquish their claim to the remainder of their deposits, delivered up to him their scrip certificates.

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The bill charged that the number of the shareholders was too great to admit of all of them being made parties, and that all of them, except the Defendants, had a common interest in obtaining the relief sought. It prayed for an account of the sums received, and expended and paid by the Defendants as directors or members of the managing committee, and that what should be found due from them, might be paid into Court, and be applied in paying 1 l. 8s. per share to the shareholders who had not received that sum; and that the residue might be divided amongst the Plaintiff and all the other shareholders, in proportion to the shares held by them respectively,

Two of the Defendants alleged, in their answer, that it was resolved, at the meeting mentioned in the bill, that the 1 l. 8s. per share should be paid to the shareholders, not, as the bill represented, in part, but in full satisfaction of their claims upon the directors; and consequently, that those shareholders who had received that sum, and delivered up their scrip certificates, had renounced all further claim upon the Defendants as the directors of the company; and they submitted that such of the shareholders as had not received the 1 l. 8s., ought to have been made parties to the suit.

Mr. *Bethell* and Mr. *Terrell*, in support of the objection, said that the transaction between the secretary and the shareholders who were parties to it, was an equitable release of all further claim on the part of the latter; and that the other shareholders were interested in contending

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that such was its effect; and, therefore, instead of all the shareholders having a common interest, there was a conflict of interest between two classes of them, namely, those who, like the Plaintiff, had received the 1 *l.* 8*s.* per share, and those who had not received it; and, consequently, all the individuals of the latter class ought to have been made parties, or, if they were very numerous, ought to have been represented on the record.

Mr. *James Parker* and Mr. *Bilton*, *contrà*, said that the case was precisely similar to *Apperly v. Page* (b), and *Cooper v. Webb* (c); and that the plaintiff in a creditor's suit was at liberty to sue on behalf of himself and all the other creditors, notwithstanding some of them might have been paid part of their debts.

Mr. *Terrell*, in reply, said that, in the cases cited, the interests of the plaintiffs and of the persons on whose behalf they sued, were identical; but, in the present case, the interests of the Plaintiff and of some of the persons whom he professed to represent, were conflicting; for the shareholders who were not parties to the transaction with the secretary, were interested in contending that it amounted, as the answer insisted it did, to a release.

THE VICE-CHANCELLOR:

The objection is not that all the shareholders ought to have been made parties, but that the Plaintiff ought to have filed his bill on behalf of himself and such of the other shareholders as received the 1 *l.* 8*s.* per share, and ought to have made all the shareholders who did not receive that sum, or some of them, at least, Defendants; and my opinion is that the objection is well founded.

(b) 1 Phill. 779.

(c) *Ante*, p. 454.

For the directors may have nothing at all remaining in their hands after they have discharged the liabilities of the company, or, if they should have anything remaining in their hands, it may not be sufficient to pay the non-recipient shareholders so much as 1 £ 8s. per share on their deposits.

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Besides, the answer represents that the Plaintiff and the other recipient shareholders, by the transaction between them and the secretary, renounced all further claim upon the funds of the company; and, supposing that to be so, they left the surplus, after satisfying the liabilities of the company, to be divided amongst those shareholders, exclusively, who have received nothing. And, in that case, there would be no person before the Court to support the case made, for that class of shareholders, by the answer. Consequently, I must allow the objection.

Mr. *Terrell* asked for the costs of the proceeding, as being in the nature of a demurrer for want of parties.

The VICE-CHANCELLOR:

I must reserve the costs of the objection until the hearing of the cause. I cannot treat it as a demurrer: it is more like a plea, for it speaks.

The Plaintiff, after he had set down the cause to be heard on the objection for want of parties, took exceptions to the answer for impertinence, and obtained an order for referring the answer and exceptions to the *Master*.

1847:
8th May.

Impertinence.
Practice.

After a plaintiff has set down a cause to be heard on an objection for want of parties raised by the answer, he cannot refer the answer for impertinence.

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Mr. *Bethell* and Mr. *Terrell* now moved to discharge the order of reference. They said that the Plaintiff could not refer the answer for impertinence after he had acted upon it by setting down the objection raised by it, to be argued; for the *Master* might strike out the very matter which rendered the adding of parties necessary: *Dixon v. Olmius* (d).

Mr. *Bilton*, for the Plaintiff, said that the objection was set down to be argued on the facts stated, not in the answer, but in the bill.

THE VICE-CHANCELLOR:

The objection can only be considered with regard to what is stated in the answer. You ask, at one moment, that a question may be decided on the record, as it stands; and you say, at the next moment, that the record ought not to stand as it is.

Motion granted.

(d) 1 Cox, 412. The page is numbered 421, by mistake.

WARE *v.* ROWLAND.

PHILIP SLATER, Esq., by his will dated the 18th of July 1806, after directing that his debts and funeral expenses should be paid out of his estates, by his residuary legatee, and giving 200 *l.* to his wife, *Ann Slater*, and the lease of his house at *Hampstead* and everything therein contained except monies and securities for monies, and appointing her, together with *Thomas Burkitt* and *Sparrow Toms*, joint executors of his will, and giving the two last 50 *l.* each for their trouble in executing his will, directed his said executors, within one month after his decease, to lay out so much money as would purchase in the 3 *l.* per Cent. Reduced Annuities, the sum of 600 *l.* per annum, and that the same should be invested in all their joint names, upon trust to pay to or permit his wife to receive the said annuity for her life, for her separate use; and he directed that, from and after her decease, the surviving trustees should transfer the said trust-monies or Government securities into their joint names, together with such other person or persons as should from time to time be appointed a new trustee or trustees pursuant to the power thereafter contained, upon trust for his daughter, *Anna Maria Slater*, and to pay and apply the said annuity of 600 *l.* to her for her separate use for life; and, *from and after her decease*, then upon trust to pay and apply, and assign and transfer, distribute and dispose of the said principal trust-monies, with the interest and dividends thereof, unto and amongst the children of his said daughter, if more than one, share and share alike, at their respective ages of twenty-four years, and not before, and to apply so much of the dividends and interest thereof as should be

1847:
7th May and
1st June.

Will.
Construction.

Testator bequeathed a fund, in trust for his wife and daughter for their lives successively; with remainder in trust for the children of his daughter; and if at her death she should leave no child living, in trust to sell the fund and pay *A.* and *B.* 500 *l.* each, if they should be *alive at that time*: and he bequeathed the remainder, *to and among his heirs at law, share and share alike.* The daughter was the testator's heir at his death. She died a spinster.

Held that her personal representative was entitled to the fund as part of her assets.

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necessary, for their maintenance and education in the meantime; and, if there should be but one such child at the decease of his said daughter, or, being more, if such child or children should die before the age of twenty-four years, then upon trust to pay, assign and transfer and dispose of the whole of the said principal monies, with the increase, interest and dividends thereof, unto and for the use and benefit of such child or children, at his, her or their respective ages of twenty-four years, and, in the meantime, to apply the dividends of the said annuity of 600 *l.*, with the increase thereof or so much as should be necessary, for his, her or their maintenance and education, and, if any surplus should remain, to invest the same in the joint names of his trustees, in accumulation of the said principal trust-monies*: and the testator further directed that if, *at the death of his said daughter*, she should leave no child or children living, or he, she or they should die under the age of twenty-four years, then his said trustees and the survivors or survivor of them or the executors or administrators of such survivor and such new trustee as aforesaid, should sell out the said trust-monies with the interest and dividends thereof, and pay, thereout, to his son-in-law, *John Giles Christian*, and his grandson, the defendant, *George Tempest Rowland*, 500 *l.* each, *if they should severally be alive at the said time*. And, as to all the rest and residue of the said principal trust-monies, with the interest, increase, and dividends, the testator bequeathed the same to and among *his heirs-at-law, share and share alike*. And the testator, after providing for the appointment of new trustees of his will, gave, devised and bequeathed all the rest, residue and remainder of his estates, both real and personal, and of what-

* The above was correctly copied from the brief.

ever kind, in reversion, expectation or possession, together with all bonds, writings, and securities for money and foreign debts, *unto his daughter*, the said *Anna Maria Slater*, and her *heirs* for ever.

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The testator died in January 1808 leaving his wife and his daughter, but no other issue, surviving. His wife died in 1815. His daughter died, intestate and a spinster, on the 17th of October 1844. *John Giles Christian* died in the lifetime of the daughter, whereby the legacy of 500 l., given to him by the will, became lapsed. After the daughter's death, the trustees of the will raised the legacy of 500 l. given to *George Tempest Rowland*, by sale of a sufficient part of the fund which they had provided for payment of the annuity of 600 l., and paid the proceeds to that gentleman.

The bill was filed by the trustees, to have the rights, shares and interests of the persons entitled to the residue of the fund, ascertained. It stated that *George Tempest Rowland*, who was the personal representative of the testator's widow and daughter, claimed, as such, the whole residue of the fund, alleging that, by the testator's will, *his next of kin living at his death*, were entitled to it, and that his wife and daughter were such next of kin, or that his daughter was alone such next of kin: and that *G. T. Rowland*, as the personal representative of the daughter, also claimed the whole residue of the fund provided for payment of the annuity, alleging that it was specifically bequeathed to the testator's *heirs-at-law*, and that his daughter was his heir-at-law *at his decease*.

The bill further stated that claims were made to the residue of the fund by the other defendants, some of whom alleged themselves to be the testator's heirs-at-

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law *at the decease of his daughter*, and the rest, his next of kin at her decease.

In pursuance of the decree at the hearing, the Master found that the testator's daughter was his sole next of kin and heir-at-law at his death: that two other persons were *his heirs-at-law at his daughter's death*, and *were his heirs-at-law at the date of the report*: that certain other persons *would have been the testator's next of kin at his death and entitled to his personal estate according to the Statute of Distributions, if his wife and daughter had died in his lifetime*: and that another person *was the testator's sole next of kin at his daughter's death*.

The cause now came on to be heard for further directions.

Mr. Glasse and Mr. Ware appeared for the Plaintiffs, the trustees of the will.

Mr. Bethell and Mr. Hetherington, for G. T. Rowland, who was the personal representative of the testator's widow and daughter, cited *Urquhart v. Urquhart* (a).

Mr. Humphrey and Mr. Bates, for the sole next of kin of the testator living at his daughter's death, contended, first, that the words, 'heirs-at-law,' when used with reference to personal estate, meant, 'next of kin:' secondly, that, in the present case, the testator meant his next of kin, not at his own death, but at the death of his daughter; for she was one of the objects of the previous trusts, and the sole object of the residuary bequest; and as she would have taken the property by operation

(a) *Ante*, Vol. XIII., p. 613.

of law, it was useless to give it to her. They added that the words, 'share and share alike,' shewed that the testator contemplated that a plurality of persons might be the objects of the bequest to which those words were annexed: *Evans v. Salt* (b); *Gittings v. Macdermott* (c); *Gwynne v. Muddock* (d); *Clapton v. Bulmer* (e); *Jones v. Colbeck* (f); *Bird v. Wood* (g); *Withy v. Mangles* (h); *Elmsley v. Young* (i); *Minter v. Wraith* (k); *Mounsey v. Blamire* (l); *De Beauvoir v. De Beauvoir* (m).

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Mr. Cooper, Mr. James Parker, Mr. Younge, and Mr. Heathfield, for the parties who would have been the testator's next of kin at his death and entitled to his personal estate under the Statute of Distributions, if his wife and daughter had died in his lifetime, said that they assumed that the testator did not mean either his wife or his daughter to take under the bequest in question; for they were objects of the preceding trusts; and he could not have meant to describe his daughter by the words, 'his heirs-at-law.' They then contended that those words, coupled with the words, 'share and share alike,' meant, 'next of kin,' when they were used, as they were in this case, with regard to personal estate: *Holloway v. Holloway* (n); *Vaux v. Henderson* (o); *Gittings v. Macdermott*; *Stert v. Platel* (p); *Bird v. Wood*; and *Wilkinson v. Garrett* (q).

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|------------------------------------|----------------------------------|
| (b) 6 Beav. 266. | (k) <i>Ante</i> , Vol. XIII., p. |
| (c) 2 Myl. & Keen, 69. | 52. |
| (d) 14 Ves. 488. | (l) 4 Russ. 384. |
| (e) <i>Ante</i> , Vol. X., p. 426, | (m) <i>Ante</i> , p. 163. |
| and 5 Myl. & Cr. 108. | (n) 5 Ves. 399. |
| (f) 8 Ves. 38. | (o) 1 Jac. & Walk. 388, |
| (g) 2 Sim. & Stu. 400. | note. |
| (h) 4 Beav. 358. | (p) 5 Bing. N. C. 434. |
| (i) 2 Myl. & Keen, 82 | (q) 2 Coll. 643. |
| and 780. | |

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Mr. *Rolt* and Mr. *Sheffield*, for one of the testator's co-heirs at his daughter's death, and Mr. *Bazalgette*, for the other co-heir, said that there was nothing, in the will, to alter or control the natural meaning of the words, 'my heirs-at-law,' and, therefore, those words must be taken in their natural sense: that, if those words had been used as words of limitation, they would have been taken to mean, 'next of kin,' because they would be construed according to the nature of the property which was the subject of the gift; and, if the gift had been substitutional, as it was in *Vaux v. Henderson*, they must have been taken in the same sense: and that *Holloway v. Holloway*, *Gittings v. Macdermott*, and *Evans v. Salt*, were cases within the same principle as *Vaux v. Henderson*: but there was no case in which the word, 'heirs,' when used, as it was in this case, as a word of purchase or *descriptio personæ*, had been held to mean next of kin: that *Mounsey v. Blamire*, and *Clapton v. Bulmer*, were precisely in point, and the latter was identical, in all material particulars, with the present case; for the testator's wife and daughter were the subjects of the gifts which preceded the one on which the question arose, and that one was a new gift, and so it was in the present case; and, therefore, it would be irrational to suppose that the testator intended it to take effect in favour of the person on whose death it was to take effect. They relied also upon the testator's daughter being his residuary legatee, and concluded with citing *Wordsworth v. Wood* (r).

The VICE-CHANCELLOR:

I admit that there is very considerable difficulty in construing this will. If the right view of the case is that

(r) 4 Myl. & Cr. 641.

the bequest is void for uncertainty, then the daughter, who was the next of kin at the death of the testator, would take. But my opinion, after all that I have heard (and the question has been very fully argued, and I have had time to consider the will), is that I am bound to construe it in the simplest and plainest manner that I can.

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With respect to the claim of the next of kin other than those who filled that character at the time of the testator's death, or, I should have said, with respect to the claims of any persons other than those who are clothed with the character of heir, my opinion is that there is no ground whatever for holding that they have any right; because the testator himself has put a construction on the word, 'heirs.' For it cannot be argued, with any show of reason, that there is any substantial difference between the words, 'heirs-at-law' and, 'heirs;' and it struck me, when the cause was before me at the hearing (and I read over the will before I sent the references to the *Master*) as a very remarkable thing that, in the gift of the residue of the real and personal estate to his daughter and her heirs, the testator has shewn that the word, 'heirs,' is to be taken in its ordinary sense. Then, when I find him, in another place, speaking of his heirs-at-law, those words must be taken in the same sense as the word, 'heirs,' is afterwards used in, although I admit that the ancestor of the parties is different. In the one case the daughter would be the ancestor, and, in the other case, the testator himself would be the ancestor. So that the only question that presents a doubt to my mind, is whether, by the form of the gift of the fund which was to raise the 600*l.* a year, the persons who are named to take, are persons capable of taking in remainder at the time of the testator's death, or persons

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who would come into *esse* and, contingently, bear a given character at a time subsequent to the death of the testator. That is the only doubt in the case. With respect to that, the testator has directed that there should be set apart a certain fund to produce the 600*L*. a year, and that is given for the separate use of his daughter during her life, with remainder to her children, and then there is this direction : “ And if, at the death of my said daughter, she should leave no child or children living, or he, she or they should die under the age of twenty-four years, then I direct my trustees and the survivor or survivors of them, or the executors or administrators of such survivor and such trustee or trustees as aforesaid, to sell out the said trust-monies, with the interest and dividends thereof, and to pay thereout ” (the sentence is not well constructed, but it seems to be a direction to sell so much of the fund as, with the interest and dividends, would yield the two sums of 500*l.*: it does not appear to be a direction to sell the whole), “ and to pay thereout, to my son-in-law, *John Giles Christian*, and to my grandson, *George Tempest Rowland*, 500*l.* each, if they be severally alive at the said time.” There is no doubt that those gifts are contingent on the donees being alive at the time when their legacies were to be paid to them. Then these words follow : “ All the rest and residue of the said principal trust-monies, with the interest, increase and dividends, I give and bequeath to and among my heirs-at-law, share and share alike.” Now there might have been, for anything that the testator could tell, persons of that description at the time of his death, or there might not have been ; but the mere circumstance that there might or might not have been such persons, amounts only to this, that, if a plurality of persons did then fill the character of heir, that plural-

ity were to share equally: but, if the character of heir was filled by one person only, then, of course, there would be no division. It was utterly uncertain what might be the event: he might, independently of what might happen to his daughter and her children, have persons who would be in the situation of his heir-at-law or heirs-at-law at the time of his death; but with the contingencies I have nothing to do; and I cannot assume it as a fact, that he knew that his daughter was his heir-at-law. That is a matter which does not exist as a fact in the case before me. He might or he might not have known it. I must be guided by the mere words of the will; and it seems to me that there is not such a binding connection of the parties to take under the description of, "my heirs-at-law, share and share alike," with the time and the contingency pointed out, as to shew that those only were to take who should answer that description at that particular time and on the happening of that particular contingency. Therefore, the conclusion that I come to, is that the gift in question is a mere gift in remainder of the residue of the trust fund, to the person or persons who, at the time of the testator's death, should answer the character of his heirs-at-law.

I can put no other construction upon the words of the gift; and, therefore, if that is not the right one, I have no other alternative than to hold that the gift is void for uncertainty, and, in that case also, the personal representative of the daughter would be entitled to the property.

Declare that, in the events that have happened, the person who was the heir-at-law of the testator at the time of his decease, was, and that the Defendant, *George Tempest Rowland*, as the personal representative of *Anna*

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Maria Slater, who was such heir-at law of the said testator, is entitled to the fund*.

* Affirmed by the *Lord Chancellor*. The person who was the sole next of kin of the testator at his daughter's death was the appellant.

1847:

4th June.

Power to appoint new Trustees.

Trustees.

A testator empowered his wife (who was a *cestui que trust* under his will), during her life, and, after her death, the then surviving or continuing trustee of his will, to appoint any new trustee or trustees, as often as any of his first or future trustees should die, &c. One of the trustees named in the will, died before the testator.

WINTER v. RUDGE.

THIS was a suit for specific performance, by the vendors against the purchaser of part of a testator's estates.

The testator devised all his freehold and leasehold estates unto and to the use of *W. L. Rogers* and *Robert Winter*, their heirs, executors, &c., upon trust, with all convenient speed after his decease, and in such manner as the said trustees or trustee for the time being should, in their or his discretion, think most beneficial, to sell and dispose of the estates, and, out of the proceeds, to pay his debts and legacies, and to dispose of the residue for the benefit of his wife, and otherwise as therein mentioned; and he appointed *Rogers* and *Winter* to be the executors of his will. He then declared that the receipts of his said trustees or trustee for the time being, for any money payable to them or him under his will, should effectually discharge the person or persons to whom the same should be respectively given, from being obliged to see to the application, or from being answerable for

Held that the power did not authorize the widow to appoint a new trustee in the place of the deceased.

the misapplication or nonapplication of the money there-
in mentioned to be received: "And, as often as any of
my first or future trustees shall die, or desire to be dis-
charged from, or refuse or decline or become incapable
to act in the trusts hereby in them reposed as aforesaid,
before the said trusts shall be fully executed, I empower
my said wife during her life, and, after her decease, the
then surviving or continuing trustee, by any deed or
deeds by her, them, or him sealed and delivered in the
presence of and attested by two or more credible wit-
nesses, to appoint any new trustee or trustees in the
place of the trustee or trustees so dying or desiring to be
discharged, or refusing, declining or becoming incapa-
ble to act as aforesaid."

1847.
WINTER
v.
RUDGE.

Rogers died before the testator. After the testator's
death, his widow appointed a new trustee in the place of
Rogers. The question was, whether the power author-
ized the widow to appoint a new trustee in the event
of one of the trustees named in the will dying in the
testator's lifetime.

Mr. *James Parker* and Mr. *Kennion*, for the vendors,
referred to *Humphreys v. Howes* (a).

Mr. *Rolt* and Mr. *Pole*, for the purchaser, referred to
Walsh v. Gladstone (b).

THE VICE-CHANCELLOR:

I think that the appointment cannot be sustained.
The testator has provided for vacancies in the trustee-
ship that might occur after his death, but has not pro-
vided for a vacancy happening in his lifetime.

(a) 1 Russ. & Myl. 639.

(b) *Ante*, Vol. XIV., p. 2.

1847:

12th June.

*Injunction.**Receiver.*

The pendency of a suit, in the Ecclesiastical Court, to have a probate or letters of administration recalled, is not, of itself, a sufficient ground to induce the Court to grant an injunction, and receiver against the personal representative.

CONNOR v. CONNOR.

THE bill was filed by a person who described herself as the widow of an intestate, against his mother and sister (the former of whom was his administratrix), for the administration and distribution of his estate, and for an injunction to restrain the mother from selling or transferring a sum of stock, part of the intestate's estate, and from getting in his outstanding estate, and for a receiver. The intestate died on the 23rd of March 1847; and, on the 10th of April following, his mother took out letters of administration to his estate under the impression that he had died a bachelor. The only ground on which the application was made, was the pendency of a proceeding instituted by the Plaintiff, in the Ecclesiastical Court, to have the letters of administration recalled. There was no allegation that the administratrix was insolvent, or had wasted or misapplied the assets, or that she had obtained the letters of administration by fraud.

Mr. *James Parker* and Mr. *Prior*, for the administratrix, said that the pendency of proceedings to recall a probate or letters of administration, was not a sufficient ground for the interference of the Court. They cited *Watkins v. Brent* (a), and *Rendall v. Rendall* (b).

Mr. *Bethell*, in reply, cited *Rutherford v. Douglas* (c), and *Marr v. Littlewood* (d).

The VICE-CHANCELLOR made the order; but the Lord Chancellor discharged it on the administratrix consenting to transfer the stock into Court.

(a) 1 Myl. & Cr. 97.

(c) 1 Sim. & Stu. 111, note.

(b) 1 Hare, 152. See 154.

(d) 2 Myl. & Cr. 454.

JOHNSON v. TUCKER.

THE 23rd General Order of October, 1842, requires notice of the entering of an appearance, and of the filing of a demurrer, plea, answer, or replication to be given by the plaintiff's solicitor to the defendant's solicitor on the day on which the appearance is entered, or the demurrer, plea, answer, or replication is filed.

1847 :
12th June.

Practice.
Replication.

Replication ordered to be taken off the file, because notice of the filing of it was not given on the day on which it was filed.

In this case the replication was filed on the 11th of March, but no notice of the filing of it was given until the 15th of April. A motion was now made, on behalf of the Defendant, that the replication might be taken off the file, on the ground that the notice was not given at the time required by the Order.

Mr. *Bethell* and Mr. *Rogers* supported the motion.

Mr. *James Parker* and Mr. *Glasse* opposed it.—They said that the replication had been regularly filed, and, therefore, the Court could not order it to be taken off the file; but they admitted that the Plaintiff could not have taken any step in the cause until he had given the notice. [The *Vice-Chancellor*.—Suppose that the Plaintiff had not served the notice until the day on which the time allowed for examining witnesses, expired; he would then have deprived the Defendant of the opportunity of examining witnesses.] In that case the Defendant might have applied to the *Master*, to enlarge publication; and, no doubt, the *Master* would have granted the application.

The VICE-CHANCELLOR :

I think that this is a very reasonable application.

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JOHNSON

v.

TUCKER.

A Plaintiff has no right to subject a Defendant to the necessity of taking a course of proceeding which the rules of the Court do not require him to take. And, therefore, I shall order the replication to be taken off the file, and the Plaintiff to pay the costs of the motion.

1847:

23rd June.

Residuary legatee.

Will.

Construction.

Testator gave all his real and personal estate to his brother James and his nephew, *Malcolm*, their heirs, executors, &c., in trust, by or out of his personal estate, or by sale, mortgage or other disposition of his real estate or any part thereof, to pay his sister 1,500*l.*: and, after giving 1,000*l.* to his brother James,

he left to his brother, *Donald*, 2,000*l.*, and added: "*and also to be my residuary legatee.*" After which he gave 200*l.* to another of his sisters.

Held that *Donald* was the testator's residuary devisee as well as legatee.

EVANS v. CROSBIE.

MALCOLM CURRIE made his will, dated the 27th of February 1834, in the following words:—"I give and bequeath all my real and personal estate in possession, reversion, expectancy, or remainder, where-soever situated in *England* (except my twelve shares in the *Westminster Gas Company*), unto my brother, *Donald Currie*, of *Regent-street* aforesaid, and unto my nephew, *Malcolm Douglas Crosbie*, also of *Regent-street* aforesaid, and their heirs, executors, administrators and assigns, upon trust that they, or the survivor of them, or the heirs or assigns of such survivor, do and shall, as soon as conveniently may be after my decease, by or out of my personal estate, or by sale, mortgage, or other disposition of my real estates or any part thereof, pay unto my sister, *Flora Crosbie*, the sum of 1,500*l.* for her own absolute use and benefit, clear of any control by her husband, Captain *Crosbie*; the interest to be paid to her on her own receipt during her life; and, at her demise, the sum of 1,000*l.* to go to her daughter, *Eliza Crosbie*, and 500*l.* to her son, the said *Malcolm Douglas Crosbie*.

I leave and bequeath unto my brother, *James Currie*, the sum of 1,000*l.*, to be laid out at eligible security, and the interest to be paid to him during his life, and, at his demise, the said sum to be divided amongst his surviving children, giving his son, *Malcolm Currie*, 100*l.* towards completing his medical education. I leave and bequeath unto my brother, *Donald Currie*, the sum of 2,000*l.*, and also to be my residuary legatee. I bequeath to my paternal sister, *Catherine Currie*, the sum of 200*l.* for her own absolute use and benefit; and, in respect to my interest in the said twelve shares in the *Westminster Gas Company* before excepted, I give and bequeath the same unto my grandchildren, *Malcolm Currie Ansell* and *Charlotte Ansell*, for their sole and absolute use and benefit, free from the control of their father, *Henry Ansell*; and I do hereby further appoint my said trustees to be executors of this my will and testament."

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—
EVANS
v.
CROSBIE.

The testator died in December 1836.

The question at the hearing, was whether the words, 'my residuary legatee,' were to be construed, 'my residuary devisee and legatee.'

Mr. *Stuart* and Mr. *Shapter*, for the assignees of the testator's heir, who was a bankrupt, said that the words in question must be taken in their natural sense; that the testator had not converted his real estate, out and out, into personalty; for he had directed it to be either mortgaged or sold, and for a particular purpose only; and that, after having directed the 1,500*l.* to be paid his sister, *Flora*, he made no further mention of his real estate: *Collins v. Wakeman* (a).

(a) 2 Ves. jun. 683.

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 EVANS
 v.
 CROSBIE.

Mr. *Bethell*, Mr. *Hetherington*, and Mr. *Pearson*, for the personal representative of *Donald Currie*, said that the testator had blended his real and personal estate together, and given them, in one mass, to the trustees, for the purposes which he was about to declare by his will; and that, by the words, 'to be my residuary legatee,' he had given so much of the mass as might remain in the hands of the trustees after satisfying the purposes expressed in the antecedent part of his will, to *Donald Currie*. They cited *Pitman v. Stevens* (b), *Davenport v. Coltman* (c), *Hardacre v. Nush* (d), *Withers v. Kennedy* (e), *Bench v. Biles* (f), *Crooke v. De Vandes* (g), *Day v. Daveron* (h), and *Hope v. Taylor* (i), in which last case, the word 'legatee' was held to be equivalent to 'devisee.'

Mr. *Campbell*, for the legatees, contended that their legacies were charged on the real estates. He cited *Cross v. Kennington* (k), and *Pitman v. Stevens*.

Mr. *Stuart* replied.

THE VICE-CHANCELLOR:

It seems to me that the cases of *Day v. Daveron* and *Davenport v. Coltman*, have a value with regard to this case, in this respect, that they are authorities as to the use of the word, 'legatee,' as applicable, in the minds of the parties who used it, to a disposition of real estate. It is true that, in those two cases, the Court

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| (b) 15 East, 505. | (f) 4 Madd. 187. |
| (c) 9 Mees. & Wels. 481, | (g) 9 Ves. 197. |
| and <i>ante</i> , Vol. XII., p. 588. | (h) <i>Ante</i> , Vol. XII., p. 200. |
| (d) 5 T. R. 716. | (i) 1 Burr. 269. |
| (e) 2 Myl. & Keen, 607. | (k) 9 Beav. 150. |

looked, as it ought to do, at the whole of the will: but those two cases prove that persons not well educated, or, at least, not well instructed in law, do use the term, 'legatee,' as designating the person who, by virtue of their gift, is to take land as well as personalty. In both those cases, the term was used by persons who meant to describe those who were to take the real as well as the personal estate. If instances were wanting, no one could doubt that, in common parlance, the term, 'legatee,' implies the person who takes a benefit by the will.

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—
EVANS
v.
CROSBIE.

Now, as to this particular will: The testator commences by saying: "I give and bequeath all my real and personal estate in possession, reversion, expectancy or remainder, wheresoever situated in *England*:" that leads to an inference that he had property in some other country than *England*, which he did not think proper to dispose of by his will, and which, therefore, would go to his heir-at-law. Then he says: "except my twelve shares in the *Westminster* Gas Company, unto my brother and unto my nephew and their heirs, executors, administrators and assigns, upon trust that they or the survivor of them, or the heirs or assigns of such survivor." The testator, when he used that language, evidently thought that, if the two devisees died, the person who would have to execute the trusts, would not be the executor but the heir of the survivor alone; which shews that he has not selected a proper form of words to convey his meaning. Then he says: "do and shall, as soon as conveniently may be, by and out of my personal estate, or by sale, mortgage or other disposition of my real estate or any part thereof." It is not very clear what he meant by, 'other disposition,' as

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distinguished from sale or mortgage: "pay &c. unto my brother, *James Currie*, the sum of 1,000*l.*, to be laid out at eligible security, and the interest to be paid to him during his life, and, at his demise, the said sum to be divided amongst his surviving children, giving his son, *Malcolm Currie*, 100*l.*, towards completing his medical education." Now there a question is raised at once: for there is a defect in the expression of what was the meaning of the testator; because, supposing that *James* had had any other number of children than ten, this question would have arisen: was his son *Malcolm* to take 100*l.* and then share with the others, or was he to take 100*l.* only? The will shews a manifest deficiency of expression to carry out the testator's intention. Then he proceeds thus: "I leave and bequeath unto my brother, *Donald Currie*, the sum of 2,000*l.*, and also to be my residuary legatee." That is very remarkable, because he there appoints him residuary legatee, and then he gives his sister, *Catherine*, 200*l.* I point this out to shew the loose way in which the testator's mind was expressed. He then gives legacies to his grandchildren, free from the control of their father, which, in a legal point of view, is nonsense, as the father could have no control over their legacies.

Then, as to the question which I have to decide. It is plain, I think, that the testator meant, not merely that his sister, *Flora*, should take her legacy, but that his brother, *James*, and his sister *Catherine* should take theirs, even if there was a deficiency of personal estate. I cannot but come to this conclusion; because there is a gift to *Donald*; and, if you take the words, 'and also to be my residuary legatee,' in connection with it, it must be supposed that the testator meant

that the residuary gift should not take effect till after satisfaction of all the legacies, that is, of the legacies to *James* and *Catherine*.

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v.

CROSBIE.

Suppose that the word, 'legatee,' had not been there, and that the testator had said, merely: "and also to be my residuary;" that would be a residuary devise. Are you then to cut down the force of the word, 'residuary,' merely because you find the word, 'legatee,' added to it? It does not appear to me to be giving a strained, but a natural construction, to say that *Donald* should only take after payment of all that is given to the legatees, and should then take everything, because everything is given to him and the nephew *Malcolm* who are named as devisees both of the real and the personal estate; and there is no subsequent separation of the one species of property from the other. It appears to me that that is the true construction of the will: and I am fortified in that interpretation by seeing, from the probate of the will (which I must look at in a question relating to personal estate), that the testator's personal estate is sworn under 450*l*.

1847:
30th June.

Legacy.
Will.
Construction.

Testator bequeathed a fund in trust for his next of kin of the surname of *Crump* who should be living at the decease of *A. B.* A lady whose maiden name was *Crump*, was the testator's sole next of kin at *A. B.*'s death; but she married after the testator's death, and then took and ever afterwards bore her husband's surname, which was *Carpenter*.

Held, nevertheless, that she was entitled to the fund.

CARPENTER v. BOTT.

THOMAS CRUMP, the testator in this cause, by his will dated in 1795, directed that if his niece, *Sarah Price*, should not attain twenty-one or marry, or should die without leaving issue who, being males, should attain twenty-one, or, being females, should attain that age or marry, a trust fund which he had directed to be raised and invested for the benefit of his niece, should belong to and be divided and divisible amongst his next of kin of the surname of *Crump*, who should be living at the decease of his niece, if she should leave no issue then living, or, if she should leave issue then living, at the decease of her surviving or only issue if such issue should die under twenty-one, or before marriage, if a female, in like manner as if his said next of kin had become entitled thereto under the Statute of Distributions.

The testator died in 1796. *Sarah Price* married Sir *John Maclean*, and died in 1845 without leaving issue.

By an order in the cause, the *Master* was directed to inquire and state who were the testator's next of kin of the surname of *Crump*, living at Lady *Maclean*'s death. The *Master* found that *Hannah*, the wife of *T. Carpenter*, was the testator's sole next of kin *ex parte paternâ*, living at Lady *Maclean*'s death, and that, being the daughter of *Charles Crump* and *Jane Parry*, she was of and bore the surname of *Crump* at the testator's death and until her marriage, and that, according to the usage in *England*, she had borne ever since her marriage, and still bore, her husband's surname; but that no evidence had been laid before him to shew who were the tes-

tator's next of kin *ex parte maternâ*, of the surname of *Crump*.

1847.

CARPENTER

v.

BOTT.

The question was whether, according to the true intent and meaning of the testator, Mrs. *Carpenter* was his next of kin of the surname of *Crump*, living at Lady *Maclean*'s death.

Mr. *James Parker* and Mr. *Adams*, for Mr. and Mrs. *Carpenter*, said that Mrs. *Carpenter*'s maiden name was *Crump*, and that she bore that name at the testator's death: that the term used by the testator, was not, 'name' but, 'surname,' which meant, 'the patronymic;' and that the words of the bequest did not require the *surname of Crump to be borne at the death of Lady Maclean*. They relied on *Pyot v. Pyot (a)*, and *Leigh v. Leigh (b)*, as governing this case.

The *Vice-Chancellor*.—It appears from a note to the case of *Pyot v. Pyot*, in my copy of *Vezey Senior's Reports*, that, when the case of *Leigh v. Leigh* was argued before Lord *Eldon*, Mr. Justice *Lawrence* and Mr. Baron *Thompson*, Mr. Justice *Lawrence* said that, according to a manuscript note which he had of *Pyot v. Pyot*, the words of the bequest on which the question in that case arose, were not, 'my nearest relation of the name of *Pyot*,' as stated in the printed report, but, 'my nearest relation of the name of the *Pyots (c)*.' That explains Lord *Hardwicke's* assertion in that case, that the words of description referred, not to the actual bearing of the name at the particular time, but to the stock of the *Pyots*.

(a) 1 Vez. 335.

(b) 15 Ves. 92.

(c) See 15 Ves. 99.

1847.

CARPENTER
v.
BOTTE.

Mr. *Bethell* and Mr. *Tripp*, for parties interested in opposing the claim of Mr. and Mrs. *Carpenter*, said that the bequest was to the next of kin of the testator who should be living at Lady *Maclean's* death, and should then bear the surname; that is to say, that the testator had required the three qualifications, namely, being his next of kin, living at Lady *Maclean's* death, and bearing the surname of *Crump*, to be co-existent with each other; and that there was nothing in the will to shew that, by the word, 'surname,' the testator meant, 'stock' or, 'family,' as was the case in *Pyot v. Pyot*, and *Leigh v. Leigh*. They referred to what was said by Lord Chief Justice *Abbott* at the conclusion of the argument in *Doe v. Plumptre (d)*, and in delivering the judgment of the Court in that case, and, particularly, to the following passage in the judgment: "Upon consideration, we are of opinion that Mrs. *Wright* is not entitled; because if the word, 'name,' is to be understood in its primary sense, she was not, at the death of *Diana*, a person of that name." They added that that passage was decisive against the claim made by Mr. and Mrs. *Carpenter*.

Mr. *James Parker*, in reply, said that, in *Doe v. Plumptre*, the question arose on a deed, not on a will; besides which, the words in this case were different, both in themselves and in their collocation, from the words in that, and the Court of King's Bench forbore to give any opinion upon a case like the present; and that there was nothing in the words in this case, which had regard to the time at which the next of kin were to bear the surname of *Crump*; but all that was required, was to be the next of kin of the testator, to be of the surname of *Crump*,

(d) 3 Barn. & Ald. 474. See page 480 et seq.

and to be living at the decease of Lady *Maclean*; and, taking all those words of qualification in their primary and natural sense, Mrs. *Carpenter* was entitled to the fund.

1847.
CARPENTER
v.
BOTT.

The VICE-CHANCELLOR:

What one may collect from the decision in the Court of King's Bench, is that the Court held that the party entitled to recover in the ejectment, must have all the required qualities, and not be, for instance, merely the nearest of kin of *Diana Molyneux* who bore the name of *Brewer*; but must bear that name, and also be the nearest of kin of *Diana Molyneux*. That is clear; because we find that the party who claimed was a person whose maiden name was *Brewer*, and, at the time of *D. Molyneux*'s death, she was the nearest of kin born of the name of *Brewer*, but she was not the nearest of kin; for it is stated that Mrs. *Morley* was more nearly related to *D. Molyneux*: therefore, it is quite plain that that decision proceeded on this, namely, that the qualities must be taken separately and found collectively; and that the terms, 'of the name of *Brewer*,' could not qualify the description so as that the accidental circumstance of the name being found in one of the kin, would make that individual take in preference to one who was actually the next of kin of *D. Molyneux*.

The only question in this case, is whether the expression, 'of the surname of *Crump*,' is to be taken to be equivalent to what Lord *Hardwicke* considered to be the meaning of the words, 'of the *Pyots*,' that is, 'of the stock of the *Pyots*.' I think that it is; and, therefore, I shall declare that Mrs. *Carpenter* is entitled to the fund.

1847:

23rd June.

*Husband and
Wife.**Practice.*

A husband having obtained leave to answer separately from his wife, an order was afterwards made, on the application of the Plaintiff, that the wife should answer separately from her husband.

BRAY v. AKERS.

MR. *Bell*, for the Plaintiff, moved that one of the Defendants, a married lady, whose husband had obtained leave to answer separately from her, might be ordered to answer separately from her husband, and within a specified time.

The VICE-CHANCELLOR ordered the lady to answer separately from her husband, without specifying any time.

WESTON v. CLOWES.

1847:

2nd July.

*Costs.**Legatee.*

In a suit by a residuary legatee against the executor of the will, the testator's estate proved insufficient to pay his debts.

THIS was a suit by a residuary legatee under the will of the testator in the cause, against the executor and the other residuary legatee. The testator's estate proved to be insufficient to pay his debts.

Mr. *G. L. Russell* asked that his client, the Plaintiff, might be paid his costs as between solicitor and client, and cited *Burkitt v. Ransom* (a).

Mr. *Hardy* appeared for the executor.

Held that the Plaintiff was entitled to his costs, not as between solicitor and client, but as between party and party only.

The VICE-CHANCELLOR declined to follow the case cited; and held that the Plaintiff was entitled to costs as between party and party only.

The decision to the contrary in *Burkitt v. Ransom*, 2 Coll. 536, disapproved of.

(a) 2 Coll. 536.

COOKE v. TURNER.

COOKE v. CHOLMONDELEY.

1847 :
2nd, 9th, 16th
and 20th July.

THE bill in *Cooke v. Turner* was filed by the trustees of the will of the late Sir *Gregory Osborne Page Turner*, against his widow, and his daughter and heir-at-law, *Helen Elizabeth Fryer*, and her husband, the Rev. *Charles Gulliver Fryer*, and other persons, to have the will established and the trusts of it carried into execution. The bill in *Cooke v. Cholmondeley* was a supplemental bill, and was filed in consequence of the widow having married a gentleman named *Cholmondeley*.

Heir.
Issue, *devisavit*
vel non.
Forfeiture.
Will.

The marriage between Mr. and Mrs. *Fryer* took place in 1838, when the lady was under age. By articles executed on that occasion, Mr. *Fryer* covenanted that, when his wife should attain twenty-one or otherwise become competent thereto, he would concur with her in settling all such freehold, copyhold and leasehold estates as she should then be possessed of or become

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A testator
seised of large
real estates,
made a will by
which he gave
certain benefits
to his daughter,
who was his heir
and a married
lady; and de-
clared that if she
or her husband
or any person on
their or either
of their behalf,
should dispute
his will, or if
any proceed-

ings should be taken, *by any person whomsoever*, by any possible result of which any estate or interest could be, in any way, attainable, by his daughter or her husband, of larger extent than was intended for her by the will, and she and her husband should not formally disavow, stay or resist such proceedings to the best of their ability, then he revoked the benefits given to her.

The testator was the subject of a commission of lunacy when he made his will, and continued so until his death.

In a suit, by the trustees of the will, to establish it, the Plaintiffs proved that the testator was of sound mind when he made his will; and there was no evidence to the contrary. Nevertheless, the Court directed an issue *devisavit vel non* to be tried, the Plaintiffs to be Plaintiffs at law, and a gentleman (with whom the husband had entered into a covenant, during the infancy of his wife and in the lifetime of her father, to make a settlement of any estates that she might thereafter become entitled to) to be the Defendant at law.

1847.

COOKE

v.

TURNER.

entitled to at any time thereafter, to certain uses for the benefit of himself and his wife and their issue.

It will be seen, on referring to *Cooke v. Turner* (*ante*, Vol. XIV., pp. 218, 493), that exceptions were taken to Mr. and Mrs. *Fryer's* answer to the original bill, because they had declined to answer certain interrogatories in it, on account of the clause of forfeiture contained in the will; and that the Barons of the Exchequer, after hearing the arguments of counsel on a case stated for their opinion as to the validity of the clause, held it to be valid.

It is scarcely necessary to mention that the statement, in that case, that Mr. and Mrs. *Fryer* had demanded from the Court of Chancery and tried an issue *devisavit vel non*, was, as well as the other statements regarding her and her husband, fictitious, and that those statements were inserted only for the purpose of raising the question on which the opinion of the learned judges was desired. On the return of the certificate, the exceptions which the Plaintiffs had taken to the report of the *Master*, because he had found Mr. and Mrs. *Fryer's* answer sufficient, were overruled. After which the Plaintiffs examined Sir *Gregory's* widow, some of his medical and personal attendants, and the solicitor who prepared his will (and who was the solicitor to the commission of lunacy issued against him and a witness to his will*), as witnesses in the causes. It appeared, from their evidence, that the making of the will was the spontaneous act of Sir *Gregory* himself; that he dictated the instructions for it; that none of the terms or provisions of it, except the common clauses, were suggested to him; and that he fully comprehended the meaning and effect of it when it was prepared. It appeared, also, that Sir *Gregory's* state of

* The solicitor's clerk was the other witness.

mind was so much improved in February 1841, that, by the sanction and advice of his medical attendants, all restraint upon his conduct and actions was discontinued, and the attendance of his keepers was dispensed with; and, on the 23rd of June following, a petition, supported by an affidavit made by the late Dr. *Warburton*, was presented to the *Lord Chancellor*, by means of which an increased allowance for Sir *Gregory's* maintenance, was obtained, in order that he might remove to a larger house, and have a carriage and an establishment of servants, and might go to a watering-place at proper seasons, or on a tour, as he might be inclined.

1847.
—
COOKE
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The following passages in the solicitor's deposition to the third interrogatory, were observed upon in the judgment. After mentioning the delusions, which Sir *Gregory* laboured under prior to 1839, and giving several instances of their ceasing or decreasing in that year, the witness proceeded thus: "Another instance of the decreasing or ceasing of the said delusions, was the following circumstance. Ever since the establishment of the last commission against him, Sir *Gregory* had been in the habit of urging me at every opportunity, and such opportunities were very frequent and were constantly sought by him, to take measures to get rid of the commission against him, but he drew a remarkable distinction in speaking of this point; for he would not entertain the idea of *superseding* the commission, or allow such a term to be used; because, he said, that term implied that the commission had been, originally, a proper measure; but he insisted on again traversing the commission, and he frequently wrote letters to the *Lord Chancellor* and to leading counsel, for their interference and assistance; and nothing short of a traverse would satisfy him. For some time, however, previous to the month

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of October 1840, Sir *Gregory* had ceased to importune me in this manner, and had confined himself to insisting that there was no occasion for the restraint he was under, and to entreating that he might be relieved from having an attendant constantly with him ; and he kept continually appealing to me and to my knowledge of his state of mind in proof of the propriety of his request being complied with, and said that, if the committee would withdraw all restraint from his person and permit him to go where he pleased and unattended, and allow him, periodically, a little pocket-money, of very moderate amount, he should be perfectly satisfied ; or he expressed himself to that effect. And, when he came to me after his request had been granted, namely, on the 18th of February 1841, he appeared to be perfectly contented with the liberty that had been conceded to him, and, neither then nor on any future occasion of my conversing with him, did he recur to the subject of traverse."

The Defendants neither examined witnesses in chief, nor cross-examined the Plaintiffs' witnesses.

The cause now came on to be heard.

Mr. *Stuart* and Mr. *Freeling*, for the Plaintiffs, read the evidence in the cause, and submitted that it proved, most satisfactorily, that the testator was of sound and disposing mind when he made his will, and, therefore, a decree ought to be made, establishing the will and directing the trusts of it to be carried into execution. They cited *Levy v. Levy* (a), and *Cartwright v. Cartwright* (b).

(a) 3 Madd. 245.

(b) 1 Phillim. Eccl. Rep. 90.

Mr. *Teed*, Mr. *James Parker*, Mr. *Piggott*, and Mr. *Lewin*, appeared for the testator's widow and other persons who admitted the will to be valid and claimed under it.

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Mr. *Walford* appeared for one of the trustees of Mr. and Mrs. *Fryer*'s marriage articles.

Mr. *Willcock*, for Mr. and Mrs. *Fryer*, said that they had abstained from entering into evidence against the validity of the will, on account of the clause of forfeiture contained in it; and that, for the same reason, he declined to take any part in the argument; but he trusted that the Court would protect the interests of his clients.

Mr. *Bethell*, Mr. *Lee*, and Mr. *Saunders*, appeared for *Henry Edmund Fryer*, the other trustee of the articles, whose duty, they said, it was to protect the interests of persons who might come into *esse* and take interests under the settlement to be made in pursuance of the articles. After adverting to the previous proceedings in the cause, and, especially, to the reasons given, by the Barons of the Exchequer, for holding that the clause of forfeiture was valid, they said that the question as to the validity of the clause, had never been argued before his Honor; and that his Honor could not establish the will until he had satisfied himself that the clause was valid. [The *Vice-Chancellor*.—It seems to me that I adopted and acted upon the certificate returned by the Barons of the Exchequer, when I overruled the exceptions to the *Master*'s report as to the sufficiency of Mr. and Mrs. *Fryer*'s answer.] No discussion took place on that occasion. Your Honor made no declaration, nor expressed any opinion upon the certificate: your opinion was not even asked; you acted upon it, but

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only so far as the exceptions were concerned*. If a will contains a clause affecting the heir, and it appears to be questionable whether that clause is not contrary to the policy of the law, the Court cannot establish the will, until it has satisfied itself that the clause is valid. It is the common law right of the heir, to have an issue to try the validity of his ancestor's will; and if your Honor should be dissatisfied, as we think you will be, with the conclusion which the learned Barons have come to, it is your bounden duty to send a case to another Court of law before you establish the will. Mr. Baron Rolfe, in delivering the opinion of the learned Barons, says: "There appears to be no more reason why a person may not be restrained, by a condition, from disputing sanity, than from disputing any other doubtful question, whether of fact or of law, on which the title to a devise or grant may depend." In answer to that observation we say that it takes for granted the very point in dispute, namely, the sanity of the party by whom the condition was imposed; for the condition derives its validity from his sanity. Besides, the condition in this case is repugnant to the very nature of the instrument by which it is imposed. The case of *Stapilton v. Stapilton*, which the learned judge next refers to, was a case of contract. But there is no analogy between a will and a contract. A contract derives its validity from the consent of the parties to it; but a will is the act of the testator alone. The learned judge then puts the case of a person who, having succeeded to real property as heir to his father,

* There appears to be some doubt whether the Court can regularly direct a case for the opinion of a Court of law, on the hearing of exceptions to an answer. The Court seems to have been somewhat embarrassed, in the case reported above, in consequence of its having taken that step on the hearing of the exceptions to Mr. and Mrs. *Fryer's* answer.

devises it partly to a stranger and partly to his next brother, subject, with respect to the latter, to a proviso defeating his estate if he should dispute the devisor's legitimacy; and he then says that such a condition would be perfectly good. And so we admit it would be, provided the sanity of the devisor were undisputed. —He then says: "The question whether this proviso is void as being contrary to the policy of the law, may be well tested by considering how the case would have stood if, instead of a condition subsequent, it had been a condition precedent. Suppose that the testator had said: 'In case my daughter and her husband shall execute all deeds necessary for settling my estate in manner hereinafter mentioned, then I give her, &c.' Surely there could have been no doubt of the validity of *that*, as a condition precedent; and if so, it must be good as a condition subsequent." This is merely *idem per idem*: and the same remark may be made upon it as upon the previous parts of the reasoning; it assumes the very thing that is doubtful. Before you can arrive at the conclusion that the condition is valid, you must shew that the will is valid. There is, too, one most important fact in this case, which the learned judges seem not to have adverted to at all, namely, that the testator was the subject of a commission of lunacy down to his dying hour. The law has wisely required not only that certain solemnities shall be observed in making a will, but also that the person who makes it shall be of sound mind; and it is the duty of the Court, as it is the right of the heir or of a party who stands in his place, to ascertain whether those requisites have been complied with. But, as the Court cannot act unless it is put in motion by some individual, if that individual is obstructed, the Court itself is obstructed. The clause in question is a

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contrivance to evade the law, and contravenes the policy of the law; and, therefore, it is void.

Next we contend that, if the Court does not think proper to send a case to another Court of law, it ought, before it establishes the will, to direct an issue *devisavit vel non*, and ought to declare, at the same time, that it shall not operate to the prejudice of the heiress-at-law. Sir *Gregory Page Turner* was, as we before observed, an admitted lunatic and the subject of a commission when the will was made; and he continued so until his death. If he was not fit to manage his estate, he was not fit to dispose of it. The solicitor who prepared the will, and who, it appears, was one of the attesting witnesses to it, was the solicitor to the commission. He does not say, in his evidence, that the will was made during a lucid interval. [The *Vice-Chancellor*.—He represents that Sir *Gregory* had recovered from his insanity.] Why then was not the commission superseded? Why did the solicitor permit Sir *Gregory* to remain under the imputation of insanity if he was sane? The evidence of that gentleman and his conduct are at variance with each other; for not only did he take no step to get the commission superseded, but, at the very time when the will was executed, or, at the utmost, a few days afterwards, he represented to the *Lord Chancellor* by the petition which was presented in June 1841, not that Sir *Gregory* had recovered, but that he still continued a lunatic. Having regard to all these circumstances, we submit that the Court ought to direct an issue *devisavit vel non*, before it establishes the will: *The Attorney-General v. Parnter (c), Creagh v.*

Blood (d), *Bootle v. Blundell* (e), *Sterling v. Levingston* (f), *Powell v. Morgan* (g).

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The *Vice-Chancellor*.—It would be useless to take the opinion of a Court of law upon a clause in an instrument alleged to be a will, until it has been determined whether that instrument is a will or not. As there are unborn issue of Mr. and Mrs. *Fryer*, it is my duty to protect their interests.

Mr. *Stuart*, in reply, said that the articles executed on the marriage of Mr. and Mrs. *Fryer*, did not give Mr. *H. E. Fryer* any right to represent the unborn issue of Mr. and Mrs. *Fryer*, in any suit relating to Sir *Gregory Page Turner's* estates; for, as Mrs. *Fryer* was an infant when the articles were executed, they were a nullity as

(d) 2 Jones & Latouche, 509.

(e) 19 Ves. 494.

(f) 2 Ch. Rep. 39.

(g) *Sterling v. Levingston* was decided in M. T. 1669, and *Powell v. Morgan*, in M. T. 1688. They were cited to shew that the Court ought to accompany the direction for the issue in the principal case, with a declaration that the trial of it should not prejudice Mr. and Mrs. *Fryer*.

In *Sterling v. Levingston*, the Court directed an ejectment to be brought in order to determine the rights of the parties under a settlement, which provided that if

the Plaintiff should attempt to impeach it, the uses thereby limited to him should be void: and the Court declared that the action should not be taken as a breach or forfeiture of the proviso, nor should any advantage or benefit be any way taken of it against the Plaintiff. In *Powell v. Morgan*, a legacy was given to the Defendant, and a proviso was annexed to it, that if she opposed or hindered the execution of the will, the legacy should be void: and the Court declared that the Defendant, by defending the suit, did not forfeit the legacy.

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to her: that the covenant thereby entered into by her husband, to settle the estates, was binding on him but not on her; and, therefore, Mr. *H. E. Fryer* had no right to ask for an issue; and, indeed, that no person except Mrs. *Fryer* had a right to ask for one, and she had thought proper to waive her right; besides which, if Mr. *H. E. Fryer* were to succeed in establishing the intestacy of Sir *Gregory Page Turner*, he would defeat the interests of Mr. and Mrs. *Fryer's* issue under the will, for whom he alleged himself to be a trustee.

Mr. *James Parker* said that Mr. and Mrs. *Fryer* were the only parties who were entitled to ask for an issue, and to defend it if it should be granted; and that, if the jury should find in favour of Sir *Gregory Page Turner's* competency, the clause of forfeiture would take effect, and the Court had no right to relieve Mr. and Mrs. *Fryer* from it. He added that Mr. *H. E. Fryer* did not represent the inheritance of Sir *Gregory's* estates, and, therefore, if he defended the issue, Mrs. *Fryer* would not be bound by the finding of the jury.

Mr. *Fisher*, Mr. *Schomberg*, and Mr. *Matcham* also were counsel in the causes.

The VICE-CHANCELLOR:

I do not intend to hear any further argument in favour of the issue.

This case appears to me to be in a most singular position; and I cannot recollect any case that at all resembles it.

In the year 1814, a commission issued against Sir *Gregory Page Turner*, which was superseded in the year 1815. In the year 1823, a second commission

issued; and that lasted undisturbed and without any attempt to disturb it, until the time of his death in March 1843. It lasted, therefore, twenty years or thereabouts. The will in question was prepared in the year 1841, and the solicitor who prepared it (of whom I mean to speak with the greatest respect, for we were born in two adjacent houses) had several interviews with Sir *Gregory Page Turner* preparatory to the final execution of the will. They are stated at length in the depositions. They happened at several times, with considerable intervals; so that there was nothing like hurry; but ample time was allowed to Sir *Gregory* to understand, if, in point of law, he was capable of exercising any understanding, what it was that he really was doing. It appears that there were interviews on the 22nd and 29th of April, on the 6th, the 13th, the 20th and 27th of May, and on the 2nd and 15th of June 1841; and the will, as far as form goes, was duly executed and attested on the 15th of June.

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Now, with reference to the evidence that was given by the solicitor. If you look to his answer to the third interrogatory, you will find that submission to the existing commission is assumed to be evidence of sanity; and the desire to oppose it, to be evidence of insanity; and, as the desire to oppose it subsided, it seems to have been considered that, to that extent, there was a return of right understanding. And it is stated, most distinctly, as evidence of returning understanding, that what Sir *Gregory* wished, was not total freedom from the commission, but that he might be indulged with a carriage and with a little pocket-money, and that he might be at liberty to go about where he pleased. I can easily understand that there was a greater degree of tranquillity of mind; *that*, I think, is undisputed; but whether

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there was that perfect sanity which the law requires for the purpose of making a will, is a matter which I cannot but think ought to be further inquired into. It appears to me to be a most fearful thing, that a commission should be allowed to remain undisturbed for twenty years; and that, in the course of that time, a person who was the solicitor to the commission, and who managed all the matters in which the lunatic was concerned under the commission, should so deal with the lunatic as to obtain from him the execution of a will; and that, too, without any notice to the judge who holds the Great Seal, and who has the care of lunatics by grant from her Majesty; and that he should, at the same time that he was procuring this most solemn evidence of sanity, allow, advisedly, the commission to subsist, just as if the lunacy remained in full force. I think that it is most important to the due administration of the affairs of mankind, that such a transaction should be thoroughly sifted.

As I understand the depositions, the clause of forfeiture emanated from Sir *Gregory* and not from the solicitor; and my opinion is that that very clause, emanating, as it did, from the testator himself, tends to shew that he was conscious that he was not in that state of mind in which the law requires a man to be when he executes a will.

Then there is this to be observed: the will having been executed on the 15th of June, an affidavit was made, by Dr. *Warburton*, on the 21st, which was taken as the ground of proceedings in the lunacy, for the purpose of procuring those indulgencies which, it seems, Sir *Gregory* had set his heart upon. But that affidavit made by Dr. *Warburton*, on the 21st of June, does not

give the least hint that there was a recovery of understanding; and it could not very well do so; because the object was to obtain indulgences upon the footing that, though it might be right to continue the lunacy, still restraint might be diminished, and indulgence granted. And the petition, which was the next step, was presented by the solicitor on the 23rd of June. On the 20th of July, the order of reference to the *Master* was made; on the 7th of August the *Master* made his report; on the 9th of August a petition was presented to confirm it; and on the 10th of August the order was made for the increased maintenance; and that went on undisturbed until the death of the party. Then we have these facts: that, not only contemporaneously with the making of the will, but subsequently to the making of it, the solicitor to the commission proceeded in the manner I have described, evidently holding out, to the Great Seal and to all the world, that this gentleman who is now alleged to have been sane, was, at that time, the fit subject of a commission of lunacy. I feel, therefore, in the strongest manner, that, if ever there was a case which did demand investigation before a jury, this is a case of that character.

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Then, objections have been made to the sending of the matter for trial, because, in the first place, the heiress-at-law does not ask for it, and the husband of the heiress does not ask for it. True, and there is very good reason why they should not ask for it. I allude to the clause in the will which has subjected them to forfeiture in case they, any or either of them, or any person on their behalf, shall dispute the will. But when I find that, prior to their marriage, articles of settlement were made, and that, by those articles, Mr. *Fryer*, the husband, has bound himself to concur in the settlement of the estates

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which might descend upon his wife ; and when I find that that settlement is to be of such a nature as that issue unborn may take a benefit by means of it, it appears to me that Mr. *Henry Fryer*, who ventures to come forward and ask for an issue, does right in so doing, because he is the only person who is invested with the capacity of asking for the trial of an issue. I admit, at once, the propriety and the force of the observation that, if persons are brought forward in the Court as suitors, it is by no means the duty of the Court to put them at variance and make them try questions between themselves which they desire should not be agitated. Certainly, the Court ought not so to act. But I find that the question in this case really is whether (to use a phrase which you all will appreciate and qualify) there has not been a fraud practised on the Great Seal. And, in such a case, it seems to me that it is the duty of the Court, if it finds the request made by any person, however small an interest he may have in the matter, to listen to the request of that person and to direct the question to be tried. And I think, as I said before, that Mr. *Henry Fryer* is only duly discharging that duty of trusteeship which is imposed upon him by the marriage articles, when he asks for the issue ; because what he in effect asks, is only that there shall be a potentiality created of carrying into effect those articles, so far as the husband and wife may choose to carry them into effect. He has a right to bind the husband, if the wife is willing ; and it seems to me that what he asks is nothing more than that it may be fairly tried whether the inheritance has descended upon Mrs. *Fryer* or not ; and, when that has been determined, then the question will arise, but not till then, whether due and full effect, or any effect, can be given to the marriage articles. And my opinion is that, by virtue of those articles, meagre as they may seem

to be at present, the trustee has acquired a right and taken on himself the duty of seeing that those articles are carried into effect, if, by possibility, they may be. It is his duty, as a trustee for the unborn issue of the marriage, at least to ask that the issue may be tried, in order that it may be determined whether the inheritance has descended on Mrs. *Fryer* or not. And my opinion is that the case is, in itself, most proper to be tried, and, therefore, I shall direct an issue *devisavit vel non*, to be tried, and the Plaintiffs in equity to be the Plaintiffs in the issue, and Mr. *Henry Fryer* to be the Defendant.

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On this day the minutes of the decree were discussed. It was arranged that the order should direct the issue to be tried by a special jury, and should give liberty to pray a *tales*, if a sufficient number of special jurors should not attend.

1848:

3rd March.

Mr. *Willcock*, for Mr. and Mrs. *Fryer*, asked, on the authority of *Sterling v. Livingston (h)*, that the direction for the issue might be guarded so as to protect his clients from the clause of forfeiture in the will.

The VICE-CHANCELLOR:

It is the act of the Court.

I held, at the hearing of the cause, that Mr. *H. E. Fryer*, who is the trustee of a covenant in Mr. and Mrs. *Fryer's* marriage articles, had an interest which enabled him to stand forward as the advocate of the truth of the case in this Court; and, upon his application, without

(h) See *ante*, page 619, note (g).

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hearing a word from either Mr. or Mrs. *Fryer*, I considered that I had authority and was bound to direct an issue.

Mr. *Bethell*.—Then the issue will be directed in the usual form.

1847:

19th July.

*Legacy.**Uncertainty.**Will.*

Testatrix gave to each of the in-brothers and in-sisters for the time being resident in the several hospitals of or in the vicinity of *Canterbury*, whose yearly income should not exceed 25*l.*, an augmentation or yearly increase of 5*l.* for ever.

Held that the bequest was void for uncertainty, principally on the ground that the amount of the fund to be appropriated to answer the bequest, was not specified by the testatrix, and could not be determined.

FLINT v. WARREN.

MARY BRADDON, the testatrix in the cause, by her will dated the 6th of March 1834, gave to each of the in-brothers and in-sisters for the time being actually and *bonâ fide* resident in the several hospitals of or in the vicinity of *Canterbury*, whose yearly income should not exceed 25*l.*, an augmentation or yearly increase of 5*l.* for ever: and she directed her executors to pay to, or invest in the names of the governors, masters, trustees, or acting patrons of those hospitals, a sum of money equal to meet such yearly augmentations; and that the non-resident in-brothers and in-sisters should, during such non-residence, forfeit the proportions of such augmentation; and that such forfeitures should, from time to time, be paid over to the then resident in-brothers and in-sisters, in equal shares.

The suit was instituted for the administration of the testatrix's estate, and to carry the trusts of her will into execution. A report of the first hearing of the cause for

further directions, is given *antè*, Vol. XIV., p. 354. The *Master*, in pursuance of a reference which was then made to him without prejudice to any question in the cause, found that there were twelve hospitals in the city of *Canterbury* and its vicinity; that two of them did not contain either in-brothers or in-sisters; and that only six of the remaining ten contained in-brothers and in-sisters whose yearly income did not exceed 25*l*.

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The cause now came on to be heard a second time for further directions. The question was whether the above bequest was void for uncertainty.

Mr. *Twiss*, for the *Attorney-General*, said that he claimed the benefit of the bequest on behalf of the charity.

The *Vice-Chancellor*.—It strikes me that a difficulty in this case arises on the words, '*for the time being actually and bonâ fide resident.*'

Mr. *Bethell*, for some of the testatrix's next of kin.—The whole bequest is void for uncertainty.

Mr. *Twiss*.—I see no uncertainty in it; but if there is any, a scheme ought to be directed, in order that the general charitable intention of the testatrix may not fail.

The *Vice-Chancellor*.—If you say that there is a general gift to charity, then you have to consider what is given.

Mr. *Twiss*.—If there are ninety-four in-brothers and in-sisters whose income does not exceed 25*l*., then

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ninety-four sums of 5*l.* each are given: *Simon v. Barber* (a), *Masters v. Masters* (b).

Mr. *Cooper* and Mr. *Lewis*, for some of the next of kin of the testatrix (whose residuary estate was not disposed of by her will), said that the whole bequest was vague and indefinite. They asked, first, what was the meaning of the words, 'for the time being;' secondly, what was the amount of the fund to be set apart to answer the bequest; and, thirdly, what was the meaning of the words, 'hospitals of or in the vicinity of *Canterbury*:' *Chapman v. Brown* (c).

Mr. *Bethell* and Mr. *Chandless*, for the other next of kin, said that the words, 'for the time being,' meant, 'at the time of my death;' and, therefore, the bequest was not a bequest to charity, but to individuals, that is to say, to the in-brothers and in-sisters of the hospitals who happened to be resident at the death of the testatrix; that if a bequest was made to the in-patients of the *Middlesex* Hospital for the time being, it would enure to the benefit of the in-patients of that hospital at the testatrix's death. They then said that it was impossible to determine what hospitals the testatrix meant by the words, 'of or in the vicinity;' whether she meant the hospitals of the city of *Canterbury*, or the hospitals in the vicinity of the city of *Canterbury*: and they compared the bequest to a bequest to A. or B.: *The Attorney-General v. Sibthorp* (d), *Fillingham v. Bromley* (e), *Ridgway v. Woodhouse* (f).

(a) 5 Russ. 112.

(b) 1 P. W. 421.

(c) 6 Ves. 404.

(d) 2 Russ. & Myl. 107.

(e) Turn. & Russ. 530.

(f) 7 Beav. 437. See 443.

The VICE-CHANCELLOR held that the bequest was void for uncertainty; for, first, the testatrix had not specified the sum which was to be the subject of the bequest; and the difficulty of ascertaining the amount of the fund which the Court ought to direct to be set apart to answer the bequest, was insuperable: that, independently of the uncertainty arising from the words, 'of *or* in the vicinity,' he could not understand how the vicinity was to be determined; nor could he tell what the testatrix meant by the words, 'for the time being,'—whether she meant those in-brothers and in-sisters who should be resident in the hospitals at the time of her death, or those who should be resident there from time to time; that she apparently meant that none but resident in-brothers and in-sisters should be objects of her charity; but she had so expressed herself as to make it doubtful whether she did not mean those who should be non-residents to participate; for she said that the non-resident in-brothers and in-sisters should *forfeit* their shares; and how they could forfeit unless they had originally a right, his Honor could not see: that no human being could state what sum ought to be appropriated to answer the bequest; and, as it was uncertain what sum was given, he must declare the bequest to be void for uncertainty.

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TURNER v. CONNOR.

1847:
15th July.

Costs.
Creditor.

THIS was a suit by the next of kin of an intestate, against his administratrix, for the administration and distribution of his estate.

After a creditor had commenced an action against the administratrix of his debtor, a decree was made, in a suit by the next of kin against the administratrix, for the administration of the intestate's estate; and the administratrix gave notice of the decree to the creditor. He then gave notice to her, that he should proceed with his action, unless he was paid the costs of it: and, the costs not being paid, he delivered his declaration.

On the 28th of June 1847, *Margaret Menzies* commenced an action against the administratrix, to recover a sum of money alleged to be due to her from the intestate. On the next day, the bill was filed and the answer put in. On the 2nd of July, the cause was heard, and the usual decree in suits of the like nature, was made: On the same day, the administratrix gave *Mrs. Menzies's* attorney notice of the decree.

Afterwards, and before the 5th of July, her attorney gave the administratrix notice that, if the costs of the action were not paid, it would be proceeded with, unless the Court of Chancery should order to the contrary. The administratrix, however, did not pay the costs; and, on the 5th of July, the declaration in the action was delivered. The administratrix appeared to the action, and required security to be given by *Mrs. Menzies* (who was out of the kingdom) for the costs of it.

Mr. James Parker and *Mr. Prior* now moved, on be-

Whereupon the administratrix appeared to the action and called on the creditor (who was out of the kingdom) to give security for the costs of it.

The Court, on the application of the administratrix, restrained the creditor from proceeding with his action, but gave him all his costs at law and also the costs of the motion, and ordered the administratrix to bring the intestate's assets into Court.

half of the administratrix, for an injunction to restrain Mrs. *Menzies* from further proceeding with the action. They said that, as she had proceeded with it after she had notice of the decree, she was not entitled to the costs of the proceeding subsequent to the notice, nor to the costs of the motion: *Curre v. Bowyer* (a), *Anon.* (b), *Lord Portarlington v. Damer* (c).

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Mr. *Stuart* and Mr. *Anderson*, for Mrs. *Menzies*, contended that she was entitled to all the costs of the action, and also to the costs of the motion; because the administratrix had appeared to the action after the decree was made.

The VICE-CHANCELLOR:

The administratrix ought to have abided by the decree; but, instead of doing so, she has appeared to the action. The creditor, therefore, must be paid her costs at law and the costs of this motion; and the assets of the intestate must be brought into Court: and, on those terms, the administratrix may take the injunction.

(a) 3 Madd. 456.

(b) 2 Sim. & Stu. 424.

(c) 2 Phill. 262

1847 :
19th July.

*Railway Com-
pany.
Power to take
lands.*

The time allowed, to a railway company, for the exercise of their power to take lands, was three years from the passing of their act. During that time, they gave the Plaintiff notice of their intention to take his lands and summoned a jury to assess the value of them: but the three years expired before the jury gave their verdict; and, on that account, the *Vice-Chancellor* held that the company were not entitled to take

**BROCKLEBANK v. THE WHITEHAVEN
JUNCTION RAILWAY COMPANY.**

THE Company's Act (which was passed on the 4th of July 1844) enacted that, if the owner of any of the lands which it authorised the company to take, should refuse to accept the money agreed or awarded to be paid for them, it should be lawful for the company to pay the amount into the Bank of *England*, in the name of the Accountant-General; and that, thereupon, all the interest in such lands should vest in the company: that, in case the owner of any such lands and the company should not agree, within one month after they should have given him notice of their intention to take his lands, as to the price to be paid for them, it should be determined by a jury; but that the company should give the owner one month's notice before they issued their warrant for summoning the jury: that, if the owner of any lands which the company were authorised to take possession of, should refuse to give them possession thereof, it should be lawful for them to issue their precept to the sheriff, to deliver possession to the person appointed by the precept to receive it; and that the sheriff should, on the receipt of such precept, deliver possession accordingly; and that the compulsory power of the company to take or purchase lands should not be exercised *after the expiration of three years from the passing of the act*.*

steps for obtaining possession of the Plaintiff's lands.

But the *Lord Chancellor* did not agree with His Honor, and directed the opinion of a Court of law to be taken on the point.

* See the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, s. 123.

The Plaintiff was a ship-builder, and the owner of a yard in which he carried on his business, and which the company were authorised to take by their act; and, as they required the yard for the purpose of enlarging their station at *Whitehaven*, they, on the 5th of March 1847, gave the Plaintiff notice of their intention to take it, and afterwards offered him a certain sum for it. The Plaintiff declined the offer; whereupon the company gave him notice of their intention to have the value of the yard assessed by a jury; and, on the 19th of June, they gave him notice that they should summon the jury for the 3rd of July. On that day (which was a Saturday) the jury met, but were unable to come to any determination: in consequence of which the sheriff adjourned the proceedings until the following Monday; and, on that day, he, for the same reason, adjourned them until the day after, which was three years and two days after the passing of the act. The jury then delivered their verdict.

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Mr. *Bethell* and Mr. *Wray*, for the Plaintiff, now moved for an injunction to restrain the company from taking steps to obtain possession of the yard, on the ground that the compulsory powers of the company to take lands, expired on the 3rd of July.

Mr. *Stuart* and Mr. *Malins*, for the company, contended that the company became the purchasers of the yard as soon as they had given the Plaintiff notice of their intention to take it; and that, at all events, the finding of the jury must have relation to the 3rd of July, when their sittings commenced: that, according to the Plaintiff's construction of the act, the company would have only two years and ten months to exercise their powers; for the act required one month's notice to be given of their intention to take lands, and another

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month's notice before they summoned a jury to determine the sum to be paid for them.

The *Vice-Chancellor* said that it was quite plain that the power of the company to take lands compulsorily, expired on the 3rd of July; and that, even if the finding of the jury was to be referred to that day, still some further time must elapse before the company could pay the money into Court, and (which was the final exercise of their compulsory power) issue their precept, to the sheriff, to deliver possession of the yard to them. And, accordingly, his Honor granted the motion.

The LORD CHANCELLOR, however, on a motion being made before him to discharge the order, doubted the propriety of the *Vice-Chancellor's* decision. His Lordship said :

The *Vice-Chancellor*, when this case was before him, thought it very clear that the company were not entitled to go on to procure the possession of this land under their act of Parliament. Looking to the provisions of the act, and without taking more time to examine them, I do not propose to decide on the rights of the parties: it is unnecessary I should do so. But I entertain very serious doubt as to whether the *Vice-Chancellor* has come to a right conclusion upon the provisions of this act of Parliament.

In a case where a company is acting clearly beyond the powers of their act of Parliament, the Court will not hesitate to restrain them by injunction, and to keep them within the limits of the powers which the act of Parliament has conferred upon them. If it be a matter of doubtful construction, also, the Court may interfere,

taking care that the parties have the opportunity of having their legal rights decided in a court of law. Then the Court either tells them to ascertain their legal rights and abstains from interfering, or it interferes by injunction in the meantime, according to the circumstances of the case, the degree of doubt that may exist on the question of law, and also the comparative injury which may be inflicted on one side or the other, if the injunction is granted or refused. All those are subjects for consideration in the question, whether there should be an injunction or not in the first instance. Another ingredient which is not to be lost sight of, is the conduct of the parties themselves.

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If it rested simply on the construction of the act, I probably should not much hesitate as to what course I should adopt. But then I have to consider that this company never commenced raising this question till the month of March; that they made their station above a year ago; that, from the expiration of that year to the month of March, they never attempted to take possession of this piece of land for the purpose of the station, although, when they formed their present station, they had the power to obtain more land if they thought it necessary: but they did not think it necessary; and so they continued satisfied with what they had got, until the month of March last. They certainly were in no great hurry to proceed; for, though their powers were to expire in three or four months, and they were bound to give a month's notice before anything was done, and, after that, it was to stand over for communication with the proprietor, and another month was to intervene before they went to a jury, they actually did nothing from the 5th of March until the 18th of May. They say that there was a difficulty in getting the opinion of the

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valuers. That might or might not be an expedient step; but it was quite clear that, after the expiration of that first month, they had to proceed adversely; because the proprietor took no notice whatever of their first communication. And they might have gone on so as to have brought themselves within a reasonable time, even if they had been taking measures to ascertain the value of the property in the meantime. Instead of which, from the month of March to the 18th of May, nothing was done. From the 18th of May to the 19th of June was a necessary interval. I am not accurately informed whether any time was lost from the 19th of June to the time when the question came before a jury. But the result was that, owing to the delay which had taken place, the period when the powers of the act were to expire, arrived before the jury had given their verdict. That raises a question about which I give no further opinion than what I have already expressed; but it is the question between the parties, whether, the act of Parliament having said that, at that period, their power of purchasing and taking lands shall expire, they are prevented or not from going on to complete the purchase of the land, for the purchase of which they gave notice so early as the month of March.

If I were to dissolve the injunction absolutely, that legal question would be to be disposed of; because then the company would take the course they are obliged to adopt. They would, under the provisions of the act of Parliament, pay the amount which the jury have assessed, into the Bank, and they would obtain possession of the land in the way provided for by the act. If their powers for that purpose remain, they would be justified in so doing, and, as far as they were concerned, they would incur no further responsibility. If, on the other

hand, it should turn out that they were not authorised in the course proposed to be pursued, why then they would incur great responsibilities, and they necessarily would incur great expenses, all of which must be thrown away. They would be liable to a very large amount of damages, to the Plaintiff, for the injury which he might sustain in consequence of his property (the possession of which, he states, is extremely valuable in his business) having been taken possession of by the company. Again, the Plaintiff makes the case that he is now employed building ships in this yard; he says that his trade would be materially interfered with, if not destroyed, by his having a portion of his shipbuilding-yard converted into a railway station. I think, therefore, that there is no balance of injury which would arise from the one course or the other. I cannot think that any very pressing evil will arise, to the railway company, from not being able to enlarge their station before the opinion of a Court of law can be obtained, when I find that they had no notion of wanting the land for the purpose, when they made their present station a year ago; and that they never thought of enlarging their station until the month of March last, and that, when they did think of enlarging it, they lost so much time that, if they had not lost it, the opinion of the Court of law would, in all probability, have been obtained, so that I might have been able to act on it at the present moment. I think that the inconvenience of this question being raised on the eve of the long vacation, is very much to be attributed to the company. I think that the Plaintiff may sustain great damage by permitting the company to take possession of his yard, even if he is ultimately entitled to recover it. I think there is no corresponding evil likely to attach to the company from the period of possession being postponed, which, if they

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are right, they may be entitled to. All this would not be of weight, if the question was entirely free from doubt. But I find that the *Vice-Chancellor* has expressed a very decided opinion that the company has no such right. And, although it would be my duty (if I were bound to decide on the propriety of the opinion so expressed by the *Vice-Chancellor*) to decide that point without reference to the opinion of that learned judge, when I am weighing, not the question of law at all, but the expediency of postponing the period of decision until the opinion of a Court of law is obtained in November, I cannot help thinking that I am justified in allowing the opinion of the *Vice-Chancellor* to have so much weight as to induce me to think that there is a reasonable probability, at least, that the Court of law may be of opinion that the company has no such right as they claim.

Weighing, then, the question whether I should dissolve the injunction, against the question whether I should maintain the injunction, giving the parties leave to go to a Court of law in order to know whether the company are entitled to do what they propose to do, I think that the preponderance is in favour of continuing the injunction, on a case being directed to the Court of Common Pleas for the purpose of ascertaining what the legal rights of the company are.

There can be no difficulty in stating the case. The facts are simple ; and the question turns entirely upon the construction of the act of Parliament.

Therefore, I shall continue the injunction, and make the usual order for a case to the Court of Common Pleas.

The minutes of his Lordship's order directed the following questions to be submitted to the judges of the Common Pleas :

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First, whether the verdict of the jury, under the circumstances, was valid for the purposes of the act?

Secondly, whether the company, under the circumstances, had power to pay, or the Accountant-General to receive the amount of the money awarded by the jury, and grant a certificate as provided by the act, after the expiration of three years from the passing of the act.

Thirdly, whether, by payment of the money awarded, to the Accountant-General, any interest in the lands in question, would, under the circumstances, be vested in the company.

Fourthly, whether the company could, upon the refusal of the Plaintiff to deliver possession of the lands, issue a warrant to the sheriff, to deliver possession of them, after three years from the passing of the act.

The motion to stand over until after the judges should have made their certificate, and the injunction to be continued in the mean time and until further order.

The matter did not proceed any further, in consequence of the parties having come to a compromise.

1847 :
19th June.

*Limitation by
words of Re-
ference.
Will.*

Construction.

Testator bequeathed certain houses in trust for his grand-daughter *Martha*, for her separate use for her life, and on her decease, in trust to apply the rents for the maintenance of her children then living, and, when they should all attain twenty-one, in trust to sell and divide the produce amongst them equally; and, in case *Martha* should die without leaving issue, to divide the produce amongst such of the testator's grand-children thereafter named, as should be living at her decease. And the testator, by three separate and subsequent clauses, bequeathed other houses in trust for his grand-daughters *Charlotte*, *Sarah* and *Harriett*, for their separate use for their lives, and repeated, after each clause, "and, after her decease in trust for the issue of her body in the same manner and subject to the same conditions and limitations as hereinbefore expressed in the bequest to my grand-daughter *Martha*." In a subsequent part of his will, he declared that, if all his said grand-daughters should die without leaving issue, all the houses mentioned in his will should fall into the residue of his estate.

Charlotte died leaving issue. *Harriett* died without issue.

Held that the houses bequeathed in trust for her went over to *Martha* and *Sarah*, as being the only grandchildren of the testator living at her death.

DOUGHTY v. SALTWELL.

THOMAS NEALE made his will bearing date the 31st of October 1807, and in the following words:

"First, I will and direct that all my just debts, funeral expenses, and the charges of proving this my will, shall be paid and discharged with all convenient speed after my decease; and, after payment thereof, I give and bequeath unto my son, *Thomas Neale*, all those my leasehold messuages and tenements numbered 3, 4, 5, 6, 7, 8, 9, 10, and 11, situate on the north side of *Monmouth-street*, in the parish of *St. Giles-in-the-Fields*, in the county of *Middlesex*, and also my three leasehold messuages or tenements situate in *High-street*, in the parish of *St. Mary-le-bone*, in the said county of *Middlesex*, to hold to the said *Thomas Neale* and his heirs, upon trust that my said trustee and his heirs, do and shall pay to, or otherwise authorise, permit, and suffer my grand-daughter, *Martha Cubitt*, to receive and take the rents, issues, and profits of the said three messuages numbered 3, 4, and 5, in *Monmouth-street* aforesaid, free

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from all incumbrances, for and during the term of her natural life, exclusive of any husband or husbands she may hereafter marry, and over which he or they shall have no control, nor shall the same, or any part thereof, be subject or liable to his or their debts or engagements in anywise; and I direct that the receipt or receipts of my said grand-daughter, *Martha Cubitt*, shall, notwithstanding her coverture and whether she shall be covert or sole, be a good and sufficient discharge and discharges to my said trustee for the same: and from and immediately after the decease of my said grand-daughter, *Martha Cubitt*, upon trust that my said trustee or his heirs do and shall pay, apply, and dispose of the rents, issues, and profits of the said three messuages and premises, for and towards the maintenance, education, and benefit of all and every the child and children of my said grand-daughter, *Martha*, as may be living at the time of her decease, until they shall respectively attain the age of twenty-one years; and, when and as each child shall attain the age of twenty-one years, an equal share of the rents to be paid to him or her until they shall all attain the age of twenty-one years; at which time the said three messuages and premises to be sold for the best price that can be gotten for the same, and the produce thereof divided between them equally, share and share alike; and, in case my said grand-daughter, *Martha*, shall die without leaving any issue of her body lawfully begotten, then the same to go and be divided equally amongst such of my grandchildren hereinafter named as shall be living at the time of her decease. And upon trust to pay to, or otherwise authorise, permit, and suffer my grand-daughter, *Charlotte Cubitt*, to receive and take the rents, issues, and profits, of the said three messuages numbered 6, 7, and 8, in *Monmouth-street* aforesaid, free from all incumbrances, for and during the term of her

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natural life, independent of any husband she may marry, and her receipt alone to be a sufficient discharge; and, after her decease, *to the issue of her body lawfully begotten, in the same manner and subject to the same conditions and limitations as hereinbefore expressed in the devise to my grand-daughter, Martha.* And upon further trust to pay to, or otherwise authorise, permit, and suffer my grand-daughter, *Harriett Cubitt*, to receive and take the rents, issues, and profits of my said three messuages or tenements numbered 9, 10, and 11, in *Monmouth-street* aforesaid, free from all incumbrances, for and during the term of her natural life, independent of any husband she may marry, and her receipt alone to be a sufficient discharge; and, after her decease, *to the issue of her body lawfully begotten, in the same manner and subject to the same conditions and limitations as are above expressed in the devise to my said grand-daughter, Martha.* And upon further trust to pay to, or otherwise authorise, permit, and suffer my grand-daughter, *Sarah Elizabeth Metcalf*, to receive and take the rents, issues, and profits of my said three leasehold messuages and premises numbered 8, 16, and 17, situate in *High-street*, in the parish of *St. Mary-le-bone* aforesaid, free from all incumbrances, for and during the term of her natural life, independent of her present or any future husband she may marry, and her receipt alone to be a sufficient discharge; and, after her decease, *to the issue of her body lawfully begotten, in the same manner and subject to the same conditions and limitations as are above particularly expressed in the devise to my said grand-daughter, Martha.* And in case *all my said grandchildren shall happen to die without leaving any issue lawfully begotten*, then it is my will and intention that *all the said several trust messuages shall fall into the residue of my estate*, and go to my residuary legatee hereinafter named. I give to my sister, *Susan Warfield*, the

sum of 60 *L. per annum* for and during the term of her natural life, to be paid her by my residuary legatee, independent of her present or any future husband, and her receipt only to be a sufficient discharge for the same. I give to Mr. *Thomas Cubitt*, of *Paradise-street*, in the said parish of *St. Mary-le-bone*, 10*L.* for a ring. I give to my son, the said *Thomas Neale*, all the rest, residue, and remainder of my real and personal estate, of what nature or kind soever and wheresoever, after payment of the incumbrances thereon, to and for his own use and benefit for ever; and I appoint my said son, *Thomas Neale*, sole executor of this my last will and testament."

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The testator died in 1816. *Thomas Neale*, the son, died in 1833. The Defendant, *Saltwell*, was his executor.

All the testator's grand-daughters named in his will, married after his death; and all of them, except *Harriett*, had children. *Charlotte* died in 1828, and *Harriett* in 1846. *Martha* and *Sarah Elizabeth* were the Plaintiffs in the suit, and their children and the children of *Charlotte*, were Defendants.

The bill alleged that the Plaintiffs were advised that, in consequence of the decease of *Harriett* without issue, the three houses in *Monmouth-street*, numbered 9, 10, and 11, or the proceeds of the sale of them, had devolved upon the Plaintiffs, absolutely, as tenants in common; and that they had requested *Saltwell* to assign those houses to them accordingly; but that he had declined so to do in consequence of claims to the houses being set up by the children of the Plaintiffs and of *Charlotte*, and also because he himself claimed some interest in them as the

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personal representative of *Thomas Neale*, the son. The bill prayed that the trusts of the will might be carried into execution so far as they related to the three houses in question, and that the rights of all parties thereto might be ascertained and declared; and, particularly, that it might be declared that, in the events that had happened, the Plaintiffs were entitled to those houses, absolutely as tenants in common.

Saltwell, by his answer, submitted whether the testator's will contained any express disposition of the three houses after *Harriett's* death without issue; and whether, in the events that had happened, they had not fallen into the residue of the testator's estate.

The children of the Plaintiffs submitted that, according to the true construction of the will and in the events that had happened, one moiety of the three houses or of the proceeds of the sale thereof, belonged to the Plaintiff, *Martha*, for her life, with remainder to such of her children as should survive her, as tenants in common, absolutely; and the other moiety, to the Plaintiff, *Sarah Elizabeth*, for her life, with remainder to such of her children as should survive her, as tenants in common absolutely; and, if that was not the true construction of the will, that the Defendants took some other estates or interests in the houses or the proceeds of the sale thereof, the nature and extent of which they submitted to the judgment of the Court.

The children of *Charlotte* submitted that, according to the true construction of the will and in the events which had happened, one-third part of the three houses or of the proceeds of the sale thereof, belonged to the Plaintiff, *Martha*, for her life, with remainder to such o

her children as should survive her, as tenants in common, absolutely; another third to *Sarah* and such of her children as should survive her, in like manner; and the remaining third to the Defendants themselves, as tenants in common; and their answer concluded in the same terms as the answer of the Plaintiffs' children.

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Mr. Bethell and *Mr. Prescott White*, for the Plaintiffs, said that the question was, what was the effect of the words, "in the same manner and subject to the same conditions and limitations as hereinbefore expressed in the devise to my grand-daughter *Martha*;" and they contended that the testator meant, by those words, that the trust declared in favour of *Harriett* and her issue, should have every condition and limitation appended to it, that was appended to the trust declared in favour of *Martha* and her issue; and, consequently, as *Harriett* had died without leaving issue of her body lawfully begotten, the three houses must go and be divided equally amongst such of the testator's grandchildren named in his will, as were living at her decease. They cited *Bengough v. Edridge*(a) to shew that the word, 'hereinafter,' might be read, 'herein.'

Mr. James Parker and *Mr. Godfrey*, for the children of the Plaintiffs, referred to the clause, "And in case all my said grandchildren shall happen to die without leaving any issue lawfully begotten;" and said that, regard being had to that clause as well as to the words of reference, each of the Plaintiffs was entitled to a moiety of the three houses for her life, with remainder to her children.

(a) *Ante*, Vol. I., page 173.

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Mr. *Amphlett*, for the children of *Charlotte*, said that, according to the construction contended for by the counsel for the Plaintiffs, if all the grand-daughters but one died leaving issue, and then that one died without issue, the houses limited in trust for her and her issue, would fall into the residue; but the testator had expressly declared that none of the houses mentioned in his will should fall into the residue, except in case *all* his said grandchildren should happen to die without leaving issue lawfully begotten; and, therefore, there was an implied cross limitation over to the respective grandchildren and their issue: *Mackell v. Winter* (b).

Another gentleman appeared for Mr. *Saltwell*, the executor of *Thomas Neale*, the son, and said that the words on which the question arose, were, 'to the issue of her body lawfully begotten, in the same manner and subject to the same conditions and limitations,' not, 'with the same conditions and limitations;' and that what the testator meant by those words, was that *Harriett* and her issue should take the houses numbered 9, 10, and 11, in *Monmouth-street*, in the same manner and subject to the same conditions and limitations as *Martha* and her issue took the houses numbered 3, 4, and 5 in that street.

THE VICE-CHANCELLOR:

It is plain that the word, 'issue' means, 'children' throughout the will; and, in my opinion, the word 'limitations' means, 'limitations over.' But I do not see any necessity for saying that the word, 'hereinafter,' is

used otherwise than in its correct sense; for the testator, after having named all his four grandchildren, says: "In case all my said grandchildren shall happen to die, &c.," and, therefore, they are all, 'after named.'

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In order to arrive at the true construction of this will, we ought to read it as if the limitations of the three first-mentioned houses in *Monmouth-street*, which follow the limitations of those houses to *Martha* and her children, had been expressly repeated, *mutatis mutandis*, with regard to the testator's other houses in that street, and to his houses in *High-street*, *Mary-le-bone*; and then we should find that, if either *Charlotte* or *Sarah Elizabeth* or *Harriett* died without leaving issue, the houses to which the one so dying was entitled for her life, were to go to and be divided amongst such of the testator's grandchildren named in his will as should be living at the time of her decease. Therefore, as *Harriett* has died without leaving issue, and *Martha* and *Sarah Elizabeth* were the only grandchildren of the testator named in his will who were living at her decease, the houses which *Harriett* was entitled to for her life, go over to *Martha* and *Sarah Elizabeth*, as tenants in common.

MEMORANDUM.

Gilbert v. Cooper, antè, page 343, and *Mason v. Wakeman*, antè, page 374, have been reversed.

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PRINCIPAL MATTERS.

ACCOUNT.

A. placed his son, who was much addicted to intemperance, under the care of B., a relation by marriage, and, at his death, left his son an annuity of 500 *l*. The son resided with B. for several years after his father's death, and until a few months before his own death. B. always accompanied him when he went to receive his annuity from his father's executors, and he, as soon as he had received it, handed it over to B. to keep for him; and B., from time to time, gave him small sums, and paid his bills. Held that B. was accountable, in a Court of Equity, for what he had received from the son. [*Terry v. Wacher*] - - - - - 447

See PARTIES, 2.—TAXATION.

ACCUMULATION.

Testator directed the income of certain portions of a trust-fund to be paid to A., B., C., &c., for their lives: and, on the death of the survivor of them, the fund to be sold and the proceeds thereof, and also

the proceeds which should have accumulated in respect thereof, to be divided amongst other persons. Held that, though there were accumulations of the income of the fund which had arisen after the expiration of twenty-one years from the testator's death, the case was not within the Thellusson Act (29 & 30 Geo. 3, c. 98). [*Corporation of Bridgnorth v. Collins*] - 538

ADMINISTRATION.

By a decree, a bill was dismissed as against A., one of the defendants, and he was to be paid his costs. A bill was afterwards filed to set aside that decree; and, A. being dead, letters of administration limited to the purposes of the suit, were taken out, and the limited administrator was made a party to the suit. Held that A. was properly represented for the purposes of the suit by virtue of those letters of administration. [*Davis v. Chanter*] - - - - - 300

See TRANSFER OF STOCK IN COURT.

ADMINISTRATION OF ASSETS.

See COSTS, 9.—JURISDICTION, 1.—PORTIONS.—REAL ESTATES.—SIMPLE CONTRACT DEBTS.

AFFIDAVITS.

Defendant moved, on affidavits, to dissolve an *ex-parte* injunction. The motion stood over at the plaintiff's request. The defendant then filed his answer: after which the plaintiff filed several affidavits. On the motion being resumed, those affidavits were held to be inadmissible. [*Woodin v. Field*] - 307

See AMENDMENT.

AGREEMENT.

If an agreement consists of two distinct parts, one of which the Court can enforce, but not the other, and a bill is filed, simply, for an injunction to restrain the violation of the former part, the Court will grant the injunction, notwithstanding it would not enforce the agreement *in toto*. [*Rolfe v. Rolfe*] - 88

See SOLICITOR AND CLIENT, 2.

ALIEN.

Testator devised freeholds and leaseholds to four persons, intending them to hold the same in trust for an alien, and, shortly afterwards, informed *three* of them of his intent, and those three, at his request, wrote letters to him acknowledging the intended trust. After his death, a suit was instituted by two of the devisees against the other two, the alien, the testator's next of kin and the Attorney-General as representing the Crown, to have the rights of the parties declared. The Court refused to make any declaration,

except that the lands were not subject to any trust. [*Burney v. MacDonald*] - - - - 6

AMENDMENT.

1. Facts occurred after a petition has been answered, cannot be introduced into it by amendment. [*Doubtfire v. Elworthy*] - - - - 77
2. The affidavit required by the 67th Order of May, 1845, on a special application to amend an information, must be made by the solicitor to the relators. [*Attorney-General v. Wakeman*] - - - - 358

See ORDER TO AMEND.

ANNUITY.

A testator gave to his wife an annuity or clear yearly rent-charge of 1,800 *l.*, *clear of all taxes and deductions*. Held that the annuity was subject to property-tax. [*Wall v. Wall*] - - - - 513

ANSWER.

1. If a defendant submits to answer a bill that is not demurrable, he must answer it fully, notwithstanding he denies the plaintiff's title and sets up an adverse one in himself. [*Dott v. Hoyes*] - - - - 372
2. If a bill is wholly demurrable, the defendant, if he answers it, must answer fully. [*Gattland v. Tanner*] 567

See HUSBAND AND WIFE, 5.—IMPERTINENCE.

ANTICIPATION.

A marriage settlement directed the trustees, during the lady's life, to receive the income of the settled property, when and as often as the same should become due, and to pay it to such person or persons as she might, from time to time, ap-

point, or to permit her to receive it for her separate use; and it declared that her receipts, or the receipts of any person or persons to whom she might appoint the same *after it should become due*, should be valid discharges for it. Held that the lady was restrained from anticipating the income provided for her. [*Field v. Evans*] - - 375

APPOINTMENT.

1. A will, in order to be a good exercise of a power, was required to be signed and *published* by the donee, in the presence of and *attested* by two or more credible witnesses. The donee made a will, which was signed by him and was attested thus:—"We, the undersigned, attest to have seen the above testator sign the above will." Held that that clause was, in effect, an attestation to the publication as well as the signature of the will, and, consequently, that the power was well exercised. [*Bartholomew v. Harris*] - - - - 78
2. A testatrix, having personal property of her own and a power, under her father's will, to appoint a fund, by deed or will, amongst her brothers and sisters, after directing her debts and funeral and testamentary expenses to be paid out of her personal state, and giving pecuniary legacies to persons not objects of the power, and a portion of the fund over which she had the power, to persons who were objects of it, bequeathed the residue of *her personal estate after payment of her debts, funeral and testamentary expenses and the before-mentioned legacies*, to two persons who also were objects of the power. Held that the residuary clause was a valid

appointment of the remainder of the fund over which she had the power. [*Elliott v. Elliott*] 321

APPOINTMENT OF NEW TRUSTEES.

See TRUSTEES.

APPORTIONMENT.

A., on his father's death, became tenant in tail in possession of estates, with remainder to his younger brother in tail. After the father's death, a suit was instituted, on behalf of A. and his younger brother (both of whom were infants), and a receiver of the rents of the estates was appointed. The younger brother was made a party to that suit, as being entitled to a portion out of the estates. A. died under twenty-one, and without issue. At his death, the estates were held, as they had been ever since his father's death, *by yearly tenants under parol demises*. Held that A.'s administratrix was entitled to a proportionate part of the rents which were accruing due at his death. [*Kevill v. Davies*] - - 466

ARTICLES OF SEPARATION.

Articles of separation between John Wright Henniker Wilson and Mary Wright Henniker Wilson, his wife, provided that all the rents, taxes, and other outgoings in respect of certain estates, which were originally the property of the latter, should be paid by the former up to a day named, and that, after that day, they should be paid by Mary Wright Henniker Wilson, and that John Wright Henniker Wilson should be indemnified therefrom, *and from all the present debts and liabilities of the said John Wright Henniker*

Wilson. Held that, as the words in italics made the clause inconsistent with and repugnant to itself, they ought to be disregarded. [*Wilson v. Wilson*] - - - 487

ASSETS, ADMINISTRATION OF.

See COSTS, 9.—PORTIONS.—REAL ESTATES.—SIMPLE CONTRACT DEBTS.

ASSIGNEE.

See DEBTOR.

ASSIGNMENT.

A. made a voluntary assignment of turnpike bonds and shares in companies, to B., in trust for himself for life, and after his death, for his nephew. He delivered the bonds and shares to B., but did not observe the formalities required, by the Turnpike-road Act and the deeds by which the companies were formed, to make the assignment effectual. Held, on his death, that no interest in either the bonds or the shares passed by the assignment, and that B. ought to deliver them to his executors. [*Searle v. Law*] - - - - - 95

ATTESTATION.

See APPOINTMENT, 1.

ATTORNEY-GENERAL.

In a suit to have the rights of the parties to the property in question declared, to which the Attorney-General was a defendant as representing the Crown, the Court refused to give the Attorney-General his costs, though it gave all the other parties their costs as between solicitor and client. [*Burney v. Macdonald*] - - - - - 6
See COSTS, 2.

BILL OF REVIEW.

1. After decree in a suit against the heir of A., the plaintiff petitioned for leave to file a bill of review, alleging error apparent on the face of the decree, and also that the plaintiff had discovered, since the hearing, that the defendant was the executor of A., and that it was essential to the establishment of the plaintiff's rights, to bring the defendant before the Court, in his executorial character. Petition dismissed, because a bill of review for error apparent, may be filed without the leave of the Court; and because the defendant had admitted, in his answer, that A.'s will was in his possession. [*Trulock v. Robey*] 265
2. In support of a bill of review for error in a decree, the pleadings in the cause cannot be referred to. Nothing can be looked at but the decree itself. [*Ibid.*] - - 277

BOARDERS.

See GRAMMAR-SCHOOL.

BONUS.

For several years prior to 1846, an assurance company declared half-yearly dividends of 27. 10s. per cent. on their stock, but, in that year, they declared a half-yearly dividend of 127. 10s. per cent. Held that a tenant for life of their stock was entitled to the whole amount of that dividend. [*Price v. Anderson*] 473

BUBBLE.

See JOINT-STOCK COMPANY.

CHARGES.

See MERGER.

CHARITY.

1. Testator bequeathed the residue of his personal estate to his executors, in trust for the establishment or institution of a charitable receptacle, if the same could be done, for fifty-four poor old men; but if no such institution could be conveniently established, he desired that the residue should be disposed of in charitable donations, of 6*l.* each, to persons of the same description. Held that the bequest was wholly void under the Statute of Mortmain. [*Attorney-General v. Hodgson*]

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2. P. Blundell, by his will dated in 1599, founded a *free grammar-school*, for one hundred and fifty boys born, or, for the most part, before their age of six years, brought up in the town or parish of Tiverton; and directed that, if that number could not be filled up, the want should be supplied with *the children of foreigners*, and those *foreigners* only to be admitted with the assent and allowance of such ten householders of the town as should be most in the subsidy-books of the then queen and her successors; and that there should be no scholar, at the school, *under a grammar-scholar*; and after providing that there should be a master and usher for the school, and that their yearly salaries should be 50*l.* and twenty marks respectively, he willed that they should be content with that recompense, without seeking or exacting any more, either of parent or children, it being his meaning that the school should be a free-school, and not a school of exaction. Held that the terms, "*foreigners and children of foreigners*," meant children who had not been born, or, for the most part,

before the age of six years, brought up in the town or parish of Tiverton; that though it had long been the practice for the master and usher for the time being to take boarders, that practice ought to be discontinued; that, there being no longer any subsidy-books, a new qualification ought to be fixed for the ten householders; that, though some of the trustees of the charity-property resided at a considerable distance from Tiverton, they ought not to be removed, notwithstanding the testator had directed that vacancies in the trusteeship, should be supplied by persons near inhabiting; and, there being a surplus of the income of the charity-property, that the salaries of the master and usher ought to be increased, and that the propriety of appointing more ushers, and of extending the education of the scholars to matters of science and literature, including one or more of the modern languages, ought to be referred to one of the Masters of the Court. [*Attorney-General v. Earl of Devon*]

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CHOSE IN ACTION.

A trustee for sale of a testator's estates, sold part of them and paid the proceeds into court. A party entitled to a share of the testator's property, assigned his interest to S. by way of mortgage; and S. gave notice of the assignment to the trustee, but did not obtain a stop order. The remainder of the estates was afterwards sold and the proceeds paid into court under the decree in the suit. Subsequently, the assignor took the benefit of the Insolvent Debtors' Act. Held that the notice given to the trustee, was sufficient to take the assigned share out of the

order and disposition of the assignor.
[*Matthews v. Gabb*] - - - 51

See ELECTION.—VOLUNTARY
SETTLEMENT.

COMPETENCY.

See WITNESS.

CONDITION.

See WASTE.

CONSTRUCTION.

1. Testator bequeathed all his personal estate to A., subject to the payment of his *debts and funeral and testamentary expenses*, and, after charging his real estates with the payment of certain *legacies and annuities*, he devised them to B. Held that he had not exempted his personal estate from the payment of the legacies and annuities. [*Davies v. Ashford*] - - - - - 42
2. Bequest to testator's daughter for life, and, on her death, to the testator's son *and his children*. The son had no child at his father's death, but had children living at the death of the daughter. Held that his children were neither joint-tenants with him, nor entitled in remainder after his death, but that the fund belonged to him absolutely. [*Scott v. Scott*] - - - - - 47
3. Testator bequeathed his residuary estate to A., the executor and trustee of his will, with a gift over in case of the death of A., so that he might not be enabled to perform the duties thereby required of him. A. proved the will, but died before he had fully performed the trusts of it. Held that, by merely proving the will, he entitled himself to the residue absolutely. [*Hollingsworth v. Grasett*] - - - - - 52
4. Testator gave in trust to his brother E. the remainder of his property, of whatsoever kind, to assist him to bring up, educate, and provide for the children of his late brother, J., whom he named: "When my youngest nephew attains his age of twenty-one years, it is my will that all my property be equally divided amongst my nephews *or* their lawful issue, share and share alike; the division, however, is not to take place, although my youngest nephew have attained the age of twenty-one years, until the decease of my wife, my sister J., and my brother E." Held that the interests of the nephews were not contingent on their living until the youngest of them should attain twenty-one, but vested on the testator's death; and that the word, *or*, was to be construed conjunctively; and, consequently, that the nephews took estates-tail in their shares of the testator's real property, and absolute interests in the shares of his personal property. [*Parkin v. Knight*] - - - - - 83
5. Prior to the passing of the Act for assimilating the currencies of England and Ireland, an English lady married an Irish gentleman. By their settlement, which was executed at Bath where the marriage was solemnized, it was recited that the gentleman had agreed to charge certain of his estates in Ireland with the payment of a rent-charge of 1,000 *l.* a year to the lady for life, in case she should survive him: but the sum secured to her by the deed was expressed to be 1,000 *l.* a year *sterling lawful money of Ireland*. Held, nevertheless, that she was entitled to 1,000 *l.* a year sterling. [*Cope v. Cope*] - - 118
6. Testator devised all his estates in

- the funds of England, and all his manors, messuages, lands, &c., both freehold, leasehold, and copyhold, to A., B. and C., and their sons, in strict settlement, and ultimately to his own right heirs for ever, and empowered his trustees to invest the residue of his personal estate in the purchase of freehold lands in England, and to convey the same to such of the uses thereinbefore declared of his manors, messuages, lands, and premises, devised by his will, as should be then subsisting. A. and B. died, without issue, in the testator's lifetime. C., who was his heir-at-law and executor, was living, but had no issue male. The testator's next of kin filed a bill against C., praying, amongst other things, for a declaration that, in the event of C. dying without leaving issue male, the Plaintiff would be entitled to the testator's personal estate. A general demurrer to the bill was allowed. [*De Beauvoir v. De Beauvoir*] - 163
7. Testatrix bequeathed the residue of her estate, goods, chattels, and effects, which she should be possessed of, interested or entitled to at her decease, to trustees, with very special directions to apply the *whole* of the income thereof, for the benefit of her daughter, (who was a lunatic,) for her life. Held, nevertheless, that the bequest of the residue was not specific, and consequently, that certain leasehold houses, which formed part of it, ought to be sold and the proceeds invested in the Three per Cents. [*Chambers v. Chambers*] - 183
8. Testator gave his residuary real and personal estate to trustees, in trust to pay the rents, interest and dividends thereof, to his wife for her life, and, *after her decease*, to sell, convert into money, collect and get in the same, *and to pay and divide* the monies to arise therefrom, unto and equally between and amongst such of the children of his sisters Martha, Phebe, Alice, &c., *as might be living at the time of the decease of his wife, and the issue of such of them as might be then dead, in equal shares and proportions*, such issue only to take the share which their respective parents would have taken if living; provided such children or issue should then have attained twenty-one, otherwise to pay to them the interest of their shares until they should attain that age, and then to pay them the principal. The testator's wife survived him. Each of his sisters had several children. A child of Martha died before the testator's wife, leaving children, and one of those children also died *before the testator's wife*: Held, nevertheless, that that one took a vested and transmissible interest in the testator's residuary estate. [*Lyon v. Coward*] - - - 287
9. A reversion of a moiety of a farm was settled on a marriage, and the trustees were empowered to sell it *when in possession*; and the intended husband and wife covenanted that, if they should thereafter acquire any other share or interest in the farm, they would immediately thereupon convey the same so that it might become vested in the trustees upon the trusts and subject to the powers declared of the settled moiety. After that moiety had fallen into possession, a moiety of the other moiety descended to the wife, not in possession but subject to a life interest. Held, nevertheless, that it, as well as the settled moiety, were saleable

- under the power. [*Giles v. Homes*] 359
10. Articles of separation between John Wright Henniker Wilson and Mary Wright Henniker Wilson, his wife, provided that all the rents, taxes, and other outgoings in respect of certain estates, which were originally the property of the latter, should be paid by the former up to a day named, and that, after that day, they should be paid by Mary Wright Henniker Wilson, and that John Wright Henniker Wilson should be indemnified therefrom, *and from all the present debts and liabilities of the said John Wright Henniker Wilson*. Held that, as the words in italics made the clause inconsistent with and repugnant to itself, they ought to be disregarded. [*Wilson v. Wilson*] - - - 487
11. Testator bequeathed all his property in the Austrian and Russian funds, and also that vested in a Swedish mortgage-security. The testator, at the date of his will, had several sums invested on different Swedish mortgages. Held that the bequest was not void for uncertainty, but that all the sums invested on Swedish mortgages passed by it. [*Richards v. Patteson*] 501
12. Testator gave J. P. and I. P. 10 l. each for mourning, and 100 l. to J. T. N., his executor, for the trouble he would have in the execution of the will. By a codicil, he gave legacies to other persons, and directed, that if they or any other person who had a legacy left them by any will, should owe him any sum or sums of money at his decease, it should be considered *as part of their legacy*. At the testator's death, J. T. N. owed the testator 4,000 l., and two of the other legatees also owed him sums much greater than their legacies. Held that the testator intended to remit their debts, as well as to give them their legacies. [*Hyde v. Neele*] 554
13. Testator bequeathed a fund in trust for his wife and daughter for their lives successively; with remainder in trust for the children of his daughter; and if at her death she should leave no child living, in trust to sell the fund and pay A. and B. 500 l. each, if they should *be alive at that time*: and he bequeathed the remainder *to and among his heirs-at-law, share and share alike*. The daughter was the testator's heir at his death. She died a spinster. Held that her personal representative was entitled to the fund as part of her assets. [*Ware v. Rowland*] - - - 588
14. Testator bequeathed a fund in trust for his next of kin of the surname of Crump who should be living at the decease of A. B. A lady whose maiden name was Crump, was the testator's sole next of kin at A. B.'s death; but she married after the testator's death, and then took and ever afterwards bore her husband's surname, which was Carpenter. Held, nevertheless, that she was entitled to the fund. [*Carpenter v. Boff*] - - - 606
- See ANTICIPATION.—FAMILY.—GRAMMAR-SCHOOL.—LEASE.—LEGACY.—LIMITATION BY WORDS OF REFERENCE.—PORTIONS.—RESIDUARY LEGATEE.—SAVINGS.—SECOND COUSINS.—SURVIVOR OR SURVIVORS.—TRANSFER OF STOCK.—VESTING, 2.—WILL.
- CONVERSION.
1. By a marriage settlement, real estates were conveyed to trustees in

trust to sell and to hold the proceeds in trust for the husband and wife for their lives successively, remainder in trust for their children, remainder in trust for the survivor of the husband and wife absolutely. There was no child of the marriage. The husband survived his wife, and after her death consulted his solicitors upon his rights under the settlement, and they having advised him that he was entitled to the whole beneficial interest in the estates, he got possession of the settlement, and of the title-deeds, and remained in possession of them, and also of the estates, until his death. Held that thereby he declared his election to take the estates as land. [*Davies v. Ashford*] - - - - 42

2. Testator gave all his estate and effects of what nature, kind or quality soever, after payment of his debts, funeral and testamentary expenses, to trustees, their heirs, executors, &c., in trust, in case there should not be sufficient to pay the annuity thereafter given to his wife, to sell all his real and personal estate and invest the proceeds in the funds, and out of the dividends, or the rents of his real estate until the same should be sold, to pay his wife an annuity of 300*l.*, and after paying an annuity to another person, to pay the residue of the rents and dividends to his wife for her life: and he gave all the rest of his estate and effects, after payment of his debts, legacies, and funeral and testamentary expenses, and the before-mentioned annuities, to his four sisters, to be equally divided between them share and share alike; but, if any of them should die, before their shares should become due and payable, leaving a child or children, then he gave the share of such of

them so dying, unto such child or children. The testator left no residuary personal estate; and the rents of his real estate were not nearly sufficient to pay his wife's annuity. But, nevertheless, the real estate remained unsold long after her death. Held that, under the circumstances, it was to be considered as converted into personalty by the will. [*Ward v. Arch*] 389

COPYHOLDS.

By a local act of Parliament, a company was incorporated, and empowered to purchase certain lands; and all persons seised, possessed of, or interested in those lands, were empowered to convey their right and interest therein to the company, in the form prescribed by the act, which, notwithstanding some of the lands were copyhold, was adapted to the conveyance of freeholds only. A copyholder used that form, and, afterwards, died, without having made any surrender of the tenements comprised in it, to the lord of the manor. Held that the company, being a corporation, were not entitled to be admitted to the tenements, but that they were entitled to have the customary heir of the deceased tenant admitted; and the Court declared that, on his admittance, he would be a trustee for the company. [*Grand Junction Canal Company v. Dimes*] 402

See SEIZURE QUOUSQUE.

COPYRIGHT IN MUSICAL COMPOSITIONS.

The copyright in musical compositions is more extensively protected than the copyright in dramatic pieces. [*Russell v. Smith*] - - - 181

CORPORATION.

By a local act of Parliament, a company was incorporated, and empowered to purchase certain lands; and all persons seised, possessed of, or interested in those lands, were empowered to convey their right and interest therein to the company in the form prescribed by the act, which, notwithstanding some of the lands were copyhold, was adapted to the conveyance of freeholds only. A copyholder used that form, and, afterwards, died, without having made any surrender of the tenements comprised in it, to the lord of the manor. Held that the company, being a corporation, were not entitled to be admitted to the tenements, but that they were entitled to have the customary heir of the deceased tenant admitted; and the Court declared that, on his admittance, he would be a trustee for the company. [*Grand Junction Canal Company v. Dimes*] - - - 402
See MUNICIPAL CORPORATION.

COSTS.

1. In a suit to have the rights of the parties to the property in question declared, to which the Attorney-General was a defendant as representing the Crown, the Court refused to give the Attorney-General his costs, though it gave all the other parties their costs as between solicitor and client. [*Burney v. Macdonald*] - - - - - 6
2. Held, that in taxing the costs of a suit, which were to be paid by the defendant, a special retainer paid by the plaintiff to the Attorney-General, who did not usually practise in the Court of Chancery, ought to be allowed, although there were no special circumstances which rendered the employing of the Attorney-

General necessary. [*Nichols v. Haslam*] - - - - - 49

3. A defendant to a bill for discovery and to perpetuate the testimony of witnesses, is entitled to his costs of the discovery, although he has examined witnesses in chief. [*Skrine v. Powell*] - - - - - 81
4. A plaintiff, whose residence was correctly stated in the bill, ordered to give security for costs, because he had frequently changed his place of abode since the bill was filed. [*Player v. Anderson*] - - - 104
5. The general rule, that a suit cannot be revived for costs, remains in force, notwithstanding the 1 & 2 Vict. c. 110, s. 18, gives the effect of judgments to decrees and orders of courts of equity. [*Andrews v. Lockwood*] - - - - - 153, 295
6. Exceptions to a report were taken before, but were set down for argument after an act of Parliament came into operation, which rendered the question raised by them of no importance. Held that the exceptant must pay the cost of them. [*Hemming v. Spiers*] - - - - - 551
7. Where plaintiffs sue on behalf of themselves and others, the persons on whose behalf they sue are not liable to the costs of the suit. [*Scott v. Pascall*] - - - - - 559
8. Although the Court allows an objection for want of parties, at the hearing under the 39th Order of August, 1841, it will not order the costs of the proceeding to be paid to the defendant, but will reserve them until the hearing of the cause. [*Lovell v. Andrew*] - - - 581
9. In a suit by a residuary legatee against the executor of the will, the testator's estate proved insufficient to pay his debts. Held that the plaintiff was entitled to his costs, not as between solicitor and

client, but as between party and party only. The decision to the contrary in *Burkitt v. Ransom*, 2 Coll. 536, disapproved of. [*Weston v. Clowes*] - - - 610

10. After a creditor had commenced an action against the administratrix of his debtor, a decree was made, in a suit by the next of kin against the administratrix, for the administration of the intestate's estate, and the administratrix gave notice of it to the creditor. He then gave notice to her, that he should proceed with his action, unless he was paid the costs of it; and, the costs not being paid, he delivered his declaration; whereupon the administratrix appeared to the action and called on the creditor (who was out of the kingdom) to give security for the costs of it. The Court, on the application of the administratrix, restrained the creditor from proceeding with his action, but gave him all his costs at law and also the costs of the motion, and ordered the administratrix to bring the intestate's assets into Court. [*Turner v. Connor*] - - - 630

See COUNSEL.—LIEN.—MORTGAGE AND MORTGAGEE, 3.—TAXATION.—TRUST FUNDS, 2.

COUNSEL.

- A party beneficially interested in a testator's estate, employed counsel to attend for him before the Master, on a question as to the propriety of allowing certain items in the executor's discharge. Held, notwithstanding the question was one of considerable difficulty, that the expenses of employing counsel ought not to be allowed in taxing costs as between party and party. [*Russell v. Nicholls*] - - - 151
See COSTS, 1, 2.

COUSINS.

See SECOND COUSINS.

COVENANT.

- A. being seised in fee of a house and a piece of open land *near to it*, sold and conveyed the house to B., and covenanted, for himself, his heirs, and assigns, with B., his heirs and assigns, that no building whatever should, at any time thereafter, be erected on the piece of land. He afterwards sold and conveyed the piece of land to M. in fee, and took a covenant from him in the terms of that which he himself had entered into with B. The house, after divers *mesne* conveyances, became vested in X. in fee; and the piece of land, after one *mesne* conveyance, became vested in Y. in fee. Y., before the land was conveyed to him, *had notice of the covenant*; but, notwithstanding, he began to build upon the land. The Court, at the suit of X., restrained him from continuing the building. [*Mann v. Stephens*] - - - 377

See AGREEMENT.

CREDITOR.

- After a creditor had commenced an action against the administratrix of his debtor, a decree was made, in a suit by the next of kin against the administratrix, for the administration of the intestate's estate, and the administratrix gave notice of it to the creditor. He then gave notice to her, that he should proceed with his action, unless he was paid the costs of it: and the costs not being paid, he delivered his declaration; whereupon the administratrix appeared to the action and called on the creditor (who was out

of the kingdom) to give security for the costs of it. The Court, on the application of the administratrix, restrained the creditor from proceeding with his action, but gave him all his costs at law and also the costs of the motion, and ordered the administratrix to bring the intestate's assets into Court. [*Turner v. Connor*] - - - 630

See DEBTOR AND CREDITOR.

CURRENCY.

See STERLING OR CURRENCY.

DEBT.

See DEBTOR AND CREDITOR.—JUDGMENT DEBT.—WILL, 19.

DEBTOR.

A. filed a petition in the Insolvent Debtors' Court with a view to obtaining the benefit of the act. Shortly afterwards an order was made, in a suit, for payment of a sum of money to her out of Court. After the insolvent court had made an order vesting all her property in the provisional assignee, but *before it had made any adjudication respecting her*, she died. After her death a creditors' assignee was appointed. Held that notwithstanding there had been no adjudication, the assignee, and not the administrator of A., was entitled to the sum in court. [*Bruce v. Charlton*] - - - - - 562

DEBTOR AND CREDITOR.

1. A. was entitled to an annuity which was secured by a covenant and by an assignment of leaseholds to her, in trust to sell. Held that her interest under the deed might

be made available under 1 & 2 Vict. c. 110, s. 13, for payment of a judgment debt due from her. [*Harris v. Davison*] . - 128

2. A. claimed a debt before the Master, in an administration suit. The executors resisted the claim, and the Master disallowed it: but a suit was afterwards instituted in which the claim was established, and liberty was given to A. to apply for payment of his debt in the administration suit. Held that, as he had not established his debt in that suit, he was not entitled to interest upon it, under the 41st General Order of August, 1841. [*Davis v. Combermere*] - 394

See CREDITOR.—DEBTOR.—JUDGMENT DEBT.—SIMPLE CONTRACT DEBTS.—STATUTE OF LIMITATIONS.

DECREE.

1. After an order on further directions had been made, which contained a declaration as to the rights of the plaintiff, he discovered that A. ought to have been made a party to the suit, and filed a supplemental bill to bring him before the Court. On the hearing of the supplemental suit, A. objected that the declaration was erroneous in law; but the Court said that the same declaration must be made in the supplemental as had been made in the original suit; for otherwise the record would be inconsistent with itself; and that A. must present a petition of rehearing. [*Jenkins v. Cross*] - - 76

2. On a reference to the Master under a decree, all the evidence referred to in the decree, is before the Master. Therefore, a party who objects to the draft of the Master's report, on the ground that

it is not warranted by the evidence, is not bound to produce *office copies* of the depositions; but he ought, previously, to notify to the Master what parts of the evidence he intends to rely upon. [*Wilson v. Wilson*] - - - - 487

See CREDITOR.

DEED.

See CONSTRUCTION, 5.

DEFENDANT.

1. Lord P. having conveyed his estates to trustees in trust to raise money for payment of his debts, and, subject thereto, in trust for himself, a suit was instituted, by one of his creditors, against him and his other creditors, to have the trusts of the deed carried into execution. After the defendants had answered the bill, and the deeds relating to the estates had been deposited in the Master's office, Lord P. died, having devised the estates to his nephew; who, after he had been made a defendant to a supplemental bill, entered into a treaty, with an insurance company, for a loan to enable him to pay off the debts due to the plaintiff and the other parties to the suit; and, after giving them notice of his intention to pay them off, he moved that all further proceedings in the suit might be stayed, and that he and his solicitors, and the solicitors and agents of the insurance company, might be at liberty to examine the abstracts of title to the estates, with the deeds in the Master's office, and to take copies thereof, for the purpose of verifying the title to the estates and effecting the loan; and that, for the same purpose, the plaintiff and two of the defendants

might be ordered to produce, to him, and his solicitors, and to the solicitors and agents of the insurance company, all deeds, &c. in their custody relating to the estates.—Motion refused. [*Damer v. Earl of Portarlington*] - 380

2. If a defendant submits to answer a bill that is not demurrable, he must answer it fully, notwithstanding he denies the plaintiff's title and sets up an adverse one in himself. [*Dott v. Hoyes*] - - 372

See ANSWER.—COSTS, 3.—DECREE, 1.—EXAMINATION OF DEFENDANT.—INFANT, 1, 2.—NEW ORDERS, 5.—PRACTICE, 11.

DEMURRER.

See PARTIES, 1.—PLEADING, 5.

DEVISEE AND NEXT OF KIN.

A., on her father's death, became seised of real estates as his heir, and entitled under his marriage settlement to a sum which the trustees of the settlement had lent him on mortgage of the estates. She, by a deed executed shortly before her will, charged the estates and the sum secured on them with an annuity, and otherwise shewed that she intended the mortgage to be kept on foot, for the purpose, at least, of securing the annuity. By her will she devised the estates, after the payment of her own debts, and *after her father's affairs should have been settled*, to B., and died intestate as to her residuary personal estate. Held that, as against *her next of kin*, the incumbrance created on the estate, by her father, must be considered to have merged in it. [*Swabey v. Swabey*] - - 106

DISCOVERY.

1. A defendant to a bill for discovery, and to perpetuate the testimony of witnesses, is entitled to his costs of the discovery, although he has examined witnesses in chief. [*Skrine v. Powell*] - - - - - 81
2. The plaintiff claimed an estate which was in the defendant's possession, and prayed for an account and payment of the rents received by the defendant, and for a discovery of all the documents in the defendant's possession relating to the matters contained in the bill. The defendant pleaded the instrument under which he claimed, to all the relief and to so much of the discovery as related to the rents, and answered to the matters which his plea did not purport to cover, and set forth a list of all the documents in his possession relating to the matters in the bill, except such of them as related to the rents. Held that the plaintiff was entitled to a discovery of those documents also. [*Rigby v. Rigby*] - - 90

DISSOLUTION OF PARTNERSHIP.

By articles of partnership between A. and B. the partnership was to be dissolved on either party giving the other six months' notice. A. gave the required notice. Held that it was effectual, notwithstanding B. was insane when it was given. [*Robertson v. Lockie*] 285
See PARTIES, 3, 4.

DIVIDEND.

See BONUS.

DOCUMENTS.

See DISCOVERY, 2.—PRODUCTION OF DOCUMENTS.

ELECTION.

1. By a marriage settlement, real estates were conveyed to trustees in trust to sell and to hold the proceeds in trust for the husband and wife for their lives successively, remainder in trust for their children, remainder in trust for the survivor of the husband and wife absolutely. There was no child of the marriage. The husband survived his wife, and after her death consulted his solicitors upon his rights under the settlement, and they having advised him that he was entitled to the whole beneficial interest in the estates, he got possession of the settlement, and of the title-deeds, and remained in possession of them, and also of the estates, until his death. Held that thereby he declared his election to take the estates as land. [*Davies v. Ashford*] 42
2. A testator gave a legacy to his daughter, a married woman, on condition that she should relinquish her claim to a reversionary *chase* in action under his marriage settlement. Qu. whether she could elect to take the legacy against the will of her husband. [*Wall v. Wall*] 518
See CONVERSION.

ENJOYMENT IN SPECIE.

See CONSTRUCTION, 7.—LONG ANNUITIES.

EQUITABLE WASTE.

Ornamental timber protected, though the mansion-house had been pulled down, and the bill did not complain of that act. [*Morris v. Morris*] 505

ESTATE TAIL.

See WILL, 8.

EVIDENCE.

1. Evidence of the loss of a deed, and of its contents, though not strictly formal, held to be sufficient. [*Green v. Bailey*] - - - - - 542
2. A certified copy of the register of a death, under the seal of the General Registry Office, accompanied by an affidavit of identity, is sufficient evidence of the death. [*Parkinson v. Francis*] - - - 160
3. Evidence as to the heirship of daughters. [*Hemming v. Spiers*] 550
4. A suit was instituted by A. and B., two of the guardians of the poor of a parish, on behalf of themselves and the other guardians, to enforce payment of money for the benefit of the parish. Held that S. was a competent witness for the plaintiff, notwithstanding he was one of the guardians when the suit was instituted, and was interested in the result of it as a parishioner when he gave his evidence. [*Scott v. Pascall*] - - - 559

EVIDENCE IN THE MASTER'S OFFICE.

See DECREE, 2.

EXAMINATION OF A DEFENDANT AS A WITNESS.

- A. filed a bill against B. and C. B. was the principal defendant, and the only question in the cause was between A. and him. But the Court could not make a complete decree without an account being taken as between A. and C.; and, as A. had examined C. as a witness in the cause, the Court held that no decree could be made in the suit, and dismissed the bill; but without prejudice to the filing of a new one. [*Champion v. Champion*] - - - - - 101

EXCEPTIONS.

Exceptions to a report were taken before, but were set down for argument after an Act of Parliament came into operation, which rendered the question raised by them of no importance. Held that the exceptant must pay the costs of them. [*Hemming v. Spiers*] 551

EXECUTOR.

A testator bequeathed all his property to A. upon certain trusts, (but which were not co-extensive with his interest in the property), and, by a clause at the end of his will, appointed A. executor of it. Held that A. was not a trustee of the interest undisposed of for the testator's next of kin; but was entitled to it beneficially. [*Mapp v. Ellcock*] - - - - - 568

See CONSTRUCTION, 1, 3.—PLEADING, 3.—RECEIVER, 2.

EXONERATION OF PERSONAL ESTATE.

See WILL, 3.

FAMILY.

Testator gave all his property, both real and personal, to his wife for life: "and, after the death of my wife, my nephew is to be considered as heir to all my property; but I direct that whatever portion of my property may, hereafter, be possessed by him, shall be secured, by my executors, for the benefit of his family." Held, taking the whole of the will together, that the testator, by the word, 'family' meant the children, but not the wife of his nephew; and that the property ought to be settled on the nephew

for life, and on his children after his death. [*White v. Briggs*] 17, 300

FEME COVERTE.

A marriage settlement directed the trustees, during the lady's life, to receive the income of the settled property, when and as often as the same should become due, and to pay it to such person or persons as she might, from time to time, appoint, or to permit her to receive it for her separate use; and it declared that her receipts, or the receipts of any person or persons to whom she might appoint the same *after it should become due*, should be valid discharges for it. Held that the lady was restrained from anticipating the income provided for her. [*Field v. Evans*] - - - 375

FOREIGNERS.

See GRAMMAR-SCHOOL.

FORFEITURE.

See ISSUE DEVISAVIT VEL NON.

FRAUD.

1. The defendants projected, *bond fide*, a railway in Spain: but, before the plaintiff purchased shares in it, they knew that it was impracticable. Held that the plaintiff was entitled only to the relief which he might have had if the project had been a bubble *ab initio*, namely, to be repaid his purchase-money. [*Harvey v. Collett*] - - - 332
2. A. and B. consented to postpone the payment of 5,000 *l.* due to them from C., in consideration of C. procuring and giving them the plaintiff's guarantee for that sum, and C., at the same time, informed A.

and B., that the plaintiff was his niece, and was possessed of considerable property; that she had resided with him for some time; that he had been her guardian, and that she had been of age for about a year and a half. Afterwards another arrangement was made between A. and B. and C., in pursuance of which A. and B. delivered up the guarantee, and C. procured and gave them the plaintiff's cheque for 3,000 *l.*, and her promissory note for 1,200 *l.*, as securities for his paying them those sums. The Court granted, and, afterwards, continued an injunction, restraining A. and B. from prosecuting an action against the plaintiff, to recover the 3,000 *l.*; and, notwithstanding they had obtained a verdict, it refused to order the money into court. [*Maitland v. Irving*] - - - 437

FUND IN COURT.

See TRANSFER OF STOCK IN COURT.

GRAMMAR SCHOOL.

P. Blundell, by his will, dated in 1599, founded a *free grammar-school*, for one hundred and fifty boys born, or, for the most part, before their age of six years, brought up in the town or parish of Tiverton; and directed that, if that number could not be filled up, the want should be supplied with *the children of foreigners*, and those *foreigners* only to be admitted with the assent and allowance of such ten householders of the town as should be most in the subsidy-books of the then queen and her successors; and that there should be no scholar, at the school, *under a grammar scholar*; and after providing that there should be a master and usher for the school,

and that their yearly salaries should be 50 *l.* and twenty marks respectively, he willed that they should be content with that recompense, without seeking or exacting any more, either of parent or children, it being his meaning that the school should be a free-school, and not a school of exaction. Held that the terms, "foreigners and children of foreigners," meant children who had not been born, or, for the most part, before the age of six years, brought up in the town or parish of Tiverton; that though it had long been the practice for the master and usher for the time being to take boarders, that practice ought to be discontinued; that, there being no longer any subsidy-books, a new qualification ought to be fixed for the ten householders; that, though some of the trustees of the charity-property resided at a considerable distance from Tiverton, they ought not to be removed, notwithstanding the testator had directed that vacancies in the trusteeship should be supplied by persons near inhabiting; and, there being a surplus of the income of the charity-property, that the salaries of the master and usher ought to be increased, and that the propriety of appointing more ushers, and of extending the education of the scholars to matters of science and literature, including one or more of the modern languages, ought to be referred to one of the Masters of the Court. [*Attorney-General v. Earl of Devon*] 193

GUARDIAN.

See NEW ORDERS, 3.

GUARDIAN AND WARD.

See FRAUD, 2.

HEARING OF CAUSE.

An objection for want of parties having been allowed at the hearing, the plaintiffs obtained an order for leave to amend by adding parties. They did not, however, amend, but again brought on the cause for hearing, without having discharged the order, or stated on the record why they had not acted upon it. The Court refused to proceed with the hearing. [*Davis v. Chanter*] - - - 93

HEIR.

If an heir files a bill stating that his ancestor's will was duly executed and attested, but dies before the cause is heard, leaving an infant heir, the will must be proved. [*Hollings v. Kirkby*] - - - 183

2. A testator, seised of large real estates, made a will by which he gave certain benefits to his daughter, who was his heir and a married woman, and declared that if she or her husband or any person on their or either of their behalf should dispute his will, or if any proceedings should be taken by any person whomsoever by any possible result of which any estate or interest could be, in any way, attainable, by his daughter or her husband, of larger extent than was intended for her by the will, and she and her husband should not formally disavow, stay or resist such proceedings to the best of their ability, then he revoked the benefits given to her. The testator was the subject of a commission of lunnacy when he made his will, and continued so until his death. In a suit, by the trustees of the will, to establish it, the plaintiffs proved that the testator was of sound mind when he made his will; and there was no evidence to the contrary.

Nevertheless, the Court directed an issue *devisavit vel non* to be tried, the plaintiffs to be plaintiffs at law, and a gentleman (with whom the husband had entered into a covenant, during the infancy of his wife and in the lifetime of her father, to make a settlement of any estates that she might thereafter become entitled to) to be the defendant at law. *Cooke v. Turner* - - 611

See CONSTRUCTION, 6, 13.—EVIDENCE, 3.

HEIR AND NEXT OF KIN.

See CONSTRUCTION, 6, 13.

HUSBAND AND WIFE.

1. Bill against a husband and his wife for the specific performance of an agreement, made by the husband, for the sale of an estate to the plaintiff. The bill alleged, as the grounds for making the wife a co-defendant, that she claimed an interest in the purchase-money, and had taken forcible possession of the title-deeds, and refused to part with them unless her claim was satisfied. The Court held that she was improperly made a defendant, and allowed a demurrer by her, for want of equity. [*Muston v. Bradshaw*] - - 192
2. By a marriage settlement, after reciting that the lady was entitled to real and personal property, and that it had been agreed that she should settle it, and also all other property to which she might become entitled during the coverture, upon the trusts thereafter mentioned, all her then property was vested in trustees in trust, during her life, to pay and apply the income to such person or persons as she, from time to time, by any writing or writings signed by her, should appoint, and, in default

of such appointment, to her for her separate use, and, after her death, to pay 500*l.* a year to her husband for his life: and the settlement declared that, subject to those trusts, all the trust property and all the annual produce of it which might remain unapplied at her death, should remain upon the trusts thereafter mentioned; none of which were for the benefit of her husband. The trustees received the income of the settled property, and, with the lady's privity and acquiescence, paid it into a bank, in their own names, and made remittances to her from time to time as she required money. She and her husband separated soon after their marriage; and she died in his lifetime. At her death 888*l.* were in her house, and a balance of 2,049*l.*, arisen from the income of the settled property received by the trustees, was standing to their credit in the books of the bank. Held that the husband was entitled to the 888*l.*; but that the 2,049*l.* were subject to the ultimate trust of the settlement, as being annual produce remaining unapplied at the wife's death. [*Johnstone v. Lumb*] 308

3. A lady, tenant for life of an estate, subject to a condition not to commit waste, married; and, during the coverture, her husband cut and sold timber on the estate. Held (in opposition to the doctrine in *Lord Ormonde v. Kynnersley*, 5 Madd. 369), that the condition was not in the nature of a trust, and, consequently, that neither the wife nor her estate, but the husband alone, was answerable for the waste. [*Kingham v. Lee*] - - - 396
4. A testator gave a legacy to his daughter, a married woman, on condition that she should relinquish her claim to a reversionary *chase in ac-*

- tion under his marriage settlement. Qu. whether she could elect to take the legacy against the will of her husband. [*Wall v. Wall*] - 513
5. A husband having obtained leave to answer separately from his wife, an order was made, on the application of the plaintiff, that the wife should answer separately from her husband. [*Bray v. Akers*] - - - - 610

IMPERTINENCE.

- After a plaintiff has set down a cause to be heard on an objection for want of parties raised by the answer, he cannot refer the answer for impertinence. [*Lovell v. Andrew*] 586

INCOME OR CAPITAL.

See BONUS.

INCUMBRANCES.

See DEVISEE AND NEXT OF KIN.

INDIA BONDS.

- The Court of Chancery has jurisdiction to restrain the India Company from paying the money secured by their bonds to a person who has wrongfully obtained possession of them, or to any other person than the lawful owner of them. [*Glasse v. Marshall*] - - - - 71

INDIA COMPANY.

See INDIA BONDS.

INFANT.

1. An infant defendant, on attaining twenty-one, discharged the solicitor who had acted for her in the suit. Afterwards, that solicitor was served with a subpoena for her, to hear judgment. He returned the subpoena to the plaintiff's solicitor, and stated at the same time, that

the defendant had come of age, and that he was no longer employed for her. Some months afterwards the cause was heard, but without the defendant having been served with a subpoena to hear judgment, or any one appearing for her at the hearing; and a decree was made in which she was described as an infant. Held that she was entitled to put in a new answer to the bill. [*Snow v. Hole*] - - - - 161

2. After an infant defendant had appeared, the plaintiff moved, under the 32nd Order of May, 1845, that J. S., a solicitor, might be appointed the infant's guardian, to answer the bill and defend the suit. Held that, as the infant had appeared, the Court might grant the motion on an affidavit, stating, merely, that notice of the motion had been served on the solicitor who had entered the appearance, after the expiration of the time allowed for answering, and more than six days before the hearing of the motion. [*Cookson v. Lee*] - - - - 302
3. The Court has no jurisdiction under 11 Geo. 4 & 1 W. 4, c. 65, s. 17, to lease an infant's estates, unless the infant is indefeasibly seised, either in fee or in tail, *in possession*. [*Legh, Ex parte*] - - - - 445

See HEIR.

INFORMATION.

See AMENDMENT, 2.

INJUNCTION.

1. If an agreement consists of two distinct parts, one of which the Court can enforce, but not the other, and a bill is filed, simply, for an injunction to restrain the violation of the former part, the Court will grant the injunction, notwith-

standing it would not enforce the agreement *in toto*. [*Rolfe v. Rolfe*]

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2. Order made in a summary way, to restrain a person, not a party to the suit, to whom the receiver had let a farm, part of the estates in the cause, from removing hay, straw, &c., therefrom. [*Walton v. Johnson*] - - - - - 352
3. A. being seised in fee of a house and a piece of open land near to it, sold and conveyed the house to B., and covenanted, for himself, his heirs and assigns, with B., his heirs and assigns, that no building whatever should, at any time thereafter, be erected on the piece of land. He afterwards sold and conveyed the piece of land to M. in fee, and took a covenant from him in the terms of that which he himself had entered into with B. The house, after divers *mesne* conveyances, became vested in X. in fee; and the piece of land, after one *mesne* conveyance, became vested in Y. in fee. Y., before the land was conveyed to him, *had notice of the covenant*; but, notwithstanding, he began to build upon the land. The Court, at the suit of X., restrained him from continuing the building. [*Mann v. Stephens*] 377
4. The pendency of a suit, in the Ecclesiastical Court, to have a probate or letters of administration recalled, is not, of itself, a sufficient ground to induce the Court to grant an injunction and receiver against the personal representative. [*Connor v. Connor*] - - - - - 599

See AFFIDAVITS.—FRAUD, 2.—
INDIA BONDS.

INSOLVENT DEBTOR.

- A. filed a petition in the Insolvent

Debtors' Court, with a view to obtaining the benefit of the act. Shortly afterwards an order was made, in a suit, for payment of a sum of money to her out of court. After the Insolvent Court had made an order vesting all her property in the provisional assignee, but *before it had made any adjudication respecting her*, she died. After her death a creditors' assignee was appointed. Held that, notwithstanding there had been no adjudication, the assignee, and not the administrator of A., was entitled to the sum in court. [*Bruce v. Charlton*] - - - - - 562

See ORDER AND DISPOSITION.

INSUFFICIENCY.

See ANSWER.

INTEREST.

1. A. claimed a debt before the Master, in an administration-suit. The executors resisted the claim, and the Master disallowed it: but a suit was afterwards instituted in which the claim was established, and liberty was given to A. to apply for payment of his debt in the administration-suit. Held that, as he had not established his debt in that suit, he was not entitled to interest upon it, under the 41st General Order of August, 1841. [*Davis v. Combermere*] - - - - - 394
2. A testator made a settlement on his daughter, who was adult, and gave her a legacy by his will. Held that the legacy did not bear interest from the death of the testator, but only from the end of the first year after that event. [*Wall v. Wall*] 513

See ELECTION.—LEGACY, 3.—
MORTGAGOR AND MORTGAGEE,
3.—SIMPLE CONTRACT DEBTS.

INTERROGATORY.

The last interrogatory for the examination of witnesses expunged, and the deposition to it suppressed, because it did not contain the words "or either of them." [*Peacock v. Kernot*] - - - - - 71

ISSUE CONSTRUED CHILDREN.

See WILL, 12.

ISSUE DEVISAVIT VEL NON.

A testator seised of large real estates, made a will, by which he gave certain benefits to his daughter, who was his heir and a married woman, and declared that if she or her husband or any person on their or either of their behalf should dispute his will, or if any proceedings should be taken by any person whomsoever by any possible result of which any estate or interest could be, in any way, attainable, by his daughter or her husband, of larger extent than was intended for her by the will, and she and her husband should not formally disavow, stay or resist such proceedings to the best of their ability, then he revoked the benefits given to her. The testator was the subject of a commission of lunacy when he made his will, and continued so until his death. In a suit by the trustees of the will, to establish it, the plaintiffs proved that the testator was of sound mind when he made his will; and there was no evidence to the contrary. Nevertheless, the Court directed an issue *devisavit vel non* to be tried, the plaintiffs to be plaintiffs at law, and a gentleman (with whom the husband had entered

into a covenant, during the infancy of his wife and in the lifetime of her father, to make a settlement of any estates that she might thereafter become entitled to) to be the defendant at law. [*Cooke v. Turner*] - - - - - 611

JOINT-STOCK COMPANY.

The defendants projected, *bond fide*, a railway in Spain: but, before the plaintiff purchased shares in it, they knew that it was impracticable. Held that the plaintiff was entitled only to the relief which he might have had if the project had been a bubble *ab initio*, namely, to be repaid his purchase-money. [*Harvey v. Collett*] - - - 332

See PLEADING, 5.—RAILWAY COMPANY.

JOINTURE.

See STERLING OR CURRENCY.

JUDGMENT DEBT.

1. A. was entitled to an annuity which was secured by a covenant and by an assignment of leaseholds to her, in trust to sell. Held that her interest under the deed might be made available under 1 & 2 Vict. c. 110, s. 13, for payment of a judgment-debt due from her. [*Harris v. Davison*] - - - 128
2. The 40th section of the Statute of Limitations (3 & 4 Will. 4, c. 27) applies to a case in which a judgment is sought to be enforced against the personal estate, as well as to a case in which it is sought to be enforced against the land of the debtor. [*Watson v. Birch*] - 523
3. A., a creditor of a person deceased, filed a bill on behalf of himself alone against B., the personal re-

presentative of the debtor, and C., who had in his possession certain papers belonging to the debtor, on which he claimed a lien for a debt alleged to be due to him from the deceased. The bill prayed for the usual accounts of the deceased's estate, and that it might be applied in a due course of administration; that A. might have access to the papers; and that the amount of C.'s lien, *if any*, might be ascertained and paid. The decree in the cause directed an account to be taken of A.'s debt, and the amount to be paid out of a fund in court; and, if the fund should be more than sufficient for that purpose, that what should be found due to the other incumbrancers should be paid to them: but it did not direct any account to be taken of those incumbrances: and, accordingly, the Master took an account of A.'s debt only. After it had been paid, C. presented a petition in the suit, praying for an account of what was due to him, and for payment of it out of the remainder of the fund. The order made on that petition, directed the Master to inquire and state *who were the incumbrancers, other than A., referred to by the decree*. Held that neither the institution of the suit, nor any of the proceedings in it, prevented the Statute of Limitations from running against C.'s claim. [*Ibid.*]

JURISDICTION.

1. A Scotchman, by a testamentary instrument in the Scotch form, bequeathed all his personal estate to trustees, in trust to pay legacies and annuities, and the income of the surplus to A. for life, and, on A.'s death, to invest the capital in

the purchase of lands in Scotland. The trustees named in the will having disclaimed, the Court of Session appointed new trustees, who as well as A., and several of the legatees and annuitants, were resident in Scotland. A. administered to the testator's estate in England: and filed a bill in Chancery, against the trustees, for the usual accounts of the testator's estate possessed by them, and to have the residue ascertained and secured. The trustees filed a cross bill for an account of the testator's estate in England possessed by A., and to have the residue ascertained and paid over to them upon the trusts of the will. The Court refused to relinquish its jurisdiction over the fund in A.'s hands, and directed it to be paid into court, and to be invested in consols, and the dividends to be paid to A. for life. [*Preston v. Melville*] - - - - - 35

2. The Court of Chancery has jurisdiction to restrain the India Company from paying the money secured by their bonds to a person who has wrongfully obtained possession of them, or to any other person than the lawful owner of them. [*Glasse v. Marshall*] - - - - - 71
3. Order made in a summary way, to restrain a person, not a party to the suit, to whom the receiver had let a farm, part of the estates in the cause, from removing hay, straw, &c., therefrom. [*Walton v. Johnson*] - - - - - 352

4. A testator died seised of a moiety of a plantation in Jamaica. A. and B., the owners of the other moiety, granted a lease of it to the trustee and executor of the testator's will. He died before the lease expired. After his death, certain persons resident in Jamaica were appointed

receivers and managers of the testator's estates, in a suit in this country, for the execution of the trusts of the will; and a merchant in London was appointed consignee and receiver of the produce of the estates. The managers and receivers took possession of the entirety of the plantation, and shipped the produce to the consignee, but did not pay A. and B. any rent. A. and B., though not parties to the suit, petitioned, in it, to be paid the arrears of rent due to them, out of the funds in the cause, which had arisen from the balances paid in by the consignee. The Court directed a preliminary inquiry, with a view to granting the prayer of the petition. [*Neate v. Pink*] - - - - - 450

5. The Court will not allow a receiver's recognizance to be put in suit, on a report shewing merely that *something* is due from the receiver. The *precise amount* of what is due, must be stated. The Court has no jurisdiction to order the personal representative of a receiver to account for the receiver's receipts, without a bill being filed. [*Ludgater v. Channell*] - - - 479

See INFANT, 3.—REAL ESTATES.

LACHES.

See VENDOR AND PURCHASER.

LEASE.

See INFANT, 3.

LEASEHOLDS.

See CONSTRUCTION, 7.

LEGACY AND LEGATEE.

1. Testator bequeathed all his personal estate to A., subject to the payment of his *debts and funeral* Vol. XV.

and testamentary expenses, and, after charging his real estates with the payment of certain *legacies and annuities*, he devised them to B. Held that he had not exempted his personal estate from the payment of the legacies and annuities. [*Davies v. Ashford*] - - - - 42

2. Bequest of 8,000 l. to testatrix's daughter, a married lady, towards purchasing a country residence: Held to be an absolute bequest. [*Knox v. Lord Hotham*] - - 82
3. A testator made a settlement on his daughter, who was adult, and gave her a legacy by his will. Held that the legacy did not bear interest from the death of the testator, but only from the end of the first year after that event. [*Wall v. Wall*] - - - - - 513

4. At a testator's death, J. N. owed him 4,000 l., but claimed to be entitled to it, as bequeathed to him by the will. By an order on motion, he was ordered to pay the 4,000 l. into Court to an account intitled "The Disputed Legacy Account of J. N.," and that sum was to be invested in stock, and the dividends were to be accumulated. At the hearing, the Court decided in favour of his claim. Held, nevertheless, that he was entitled, not to 4,000 l. sterling, but only to the stock and the accumulations, although, owing to a fall in the funds, they, together, were of less value than 4,000 l. [*Hyde v. Neate*] - - - - - 558

5. In a suit by a residuary legatee against the executor of the will, the testator's estate proved insufficient to pay his debts. Held that the plaintiff was entitled to his costs, not as between solicitor and client, but as between party and party only. The decision to the

- contrary in *Burkitt v. Ransom*, 2 Coll. 536, disapproved of. [*Weston v. Clowes*] - - - 610
6. Testatrix gave to each of the in-brothers and in-sisters *for the time being* resident in the several hospitals *of or in the vicinity* of Canterbury, whose yearly income should not exceed 25 *l.*, an augmentation or yearly increase of 5 *l.* for ever. Held that the bequest was void for uncertainty, principally on the ground that the amount of the fund to be appropriated to answer the bequest was not specified by the testatrix, and could not be determined. [*Flint v. Warren*] 626
- See CONSTRUCTION, 14.—WILL, 20, 21.

LEGACY DUTY.

- A. made a mortgage in fee to secure a sum lent to him by the trustees of his marriage settlement. On his death, his daughter became entitled to the equity of redemption of the mortgaged estate, as his heir, and, under his marriage settlement, to the mortgage-money. The trustees then conveyed the estate to her subject, expressly, to the equity of redemption, and did not release her father's covenant for repayment of the money. Afterwards, she granted an annuity to M., and, as a security for it, conveyed the estate and assigned the money to a trustee for him. By her will, she devised the estate, but did not dispose of her personal estate. Held that the money was subject to probate and legacy duty. [*Swabey v. Swabey*] - - - 502

LIEN.

- A solicitor's lien for costs, is not confined to deeds and papers, but ex-

tends to other articles delivered to him for the purpose of being exhibited to witnesses on the trial of an action. [*Friswell v. King*] 191

LIMITATION BY WORDS OF REFERENCE.

Testator bequeathed certain houses in trust for his grand-daughter, Martha, for her separate use for her life, and, on her decease, in trust to apply the rents for the maintenance of her children then living, and, when they should all attain twenty-one, in trust to sell the houses and divide the produce amongst them equally; and, in case Martha should die without leaving issue, *to divide the produce amongst such of the testator's grandchildren thereafter named, as should be living at her decease.* And the testator, by three separate and subsequent clauses, bequeathed other houses in trust for his grand-daughters Charlotte, Sarah, and Harriett, for their separate use for their lives, and repeated, after each clause, "and, after her decease, in trust for the issue of her body in the same manner and subject to the same conditions and limitations as hereinbefore expressed in the bequest to my grand-daughter Martha." In a subsequent part of his will, he declared that, if *all* his said grand-daughters should die without leaving issue, all the houses mentioned in his will, should fall into the residue of his estate. Charlotte died leaving issue. Harriett died without issue. Held that the houses bequeathed in trust for her, went over to Martha and Sarah, as being the only grandchildren of the testator living at her death. [*Doughty v. Saltwell*] - - - 640

LIMITED ADMINISTRATOR.

By a decree a bill was dismissed as against A., one of the defendants, and he was to be paid his costs. A bill was afterwards filed to set aside that decree; and, A. being dead, letters of administration limited to the purposes of the suit, were taken out and the limited administrator was made a party to the suit. Held that it was properly represented for the purposes of the suit by virtue of those letters of administration. [*Davis v. Chanter*] - - - 300

LOCAL ACT OF PARLIAMENT.

See COPYHOLDS.

LONG ANNUITIES.

Testator bequeathed all his personal estate to trustees, and directed them to convert it into money, and to pay the interest to certain persons for their lives, and then to invest the principal in the purchase of lands; *it being also understood that where his money or personal estate might be lying on undoubted real or personal security, such securities might be only renewed in the names of the trustees.* The testator's personal estate consisted, in part, of long annuities. Held that the *cestui que trust* for life of the personalty, were not entitled to receive the long annuities; but that they must be converted into consols. [*Preston v. Melville*] - - - 35

LORD AND COPYHOLDER.

See COPYHOLDS.—SEIZURE QUOUSQUE.

LOSS OF DEEDS.

1. A. made a mortgage to B., and delivered to him the title-deeds of the estate. Some years afterwards, A. gave B. notice of his intention to pay off the mortgage at the end of six months; but did not pay the money until after that time, owing to B. not having offered him any indemnity that was satisfactory to him, in respect of B. having lost some of the deeds. B. then brought an ejectment for the estate; whereupon A. filed a bill to redeem. The Court decreed a redemption, and ordered that a sum which A. had paid for interest accrued on the mortgage-money after the expiration of the six months, should be repaid to him; that B. should give him an indemnity to be approved of by the Master, and also pay the costs of the ejectment and of the suit. [*Lord Middleton v. Eliot*] 531
2. Evidence of the loss of a deed, and of its contents, though not strictly formal, held to be sufficient. [*Green v. Bailey*] - - - 542

LUNATIC.

See ISSUE DEVISAVIT VEL NON.—PARTNERSHIP.

MARRIAGE.

See RESTRAINT OF MARRIAGE.

MARSHALLING ASSETS.

Specialty creditors having exhausted their debtor's personal estate, a decree was made for marshalling his assets. A considerable time elapsed before the real estates could be made available for the purposes of the decree. Held that the simple contract creditors were not entitled to have the interest which would have accrued on the specialty debts if they

had remained unsatisfied, as well as the amount of the personal estate, raised out of the real estates and applied towards satisfaction of their debts. [*Cradock v. Piper*] - 301
See PORTIONS.

MERGER.

A., on her father's death, became seized of real estates as his heir, and entitled under his marriage settlement to a sum which the trustees of the settlement had lent him on mortgage of the estates. The testatrix, by a deed executed shortly before her will, charged the estates and the sum secured on them with an annuity, and otherwise showed that she intended the mortgage to be kept on foot, for the purpose, at least, of securing the annuity. By her will she devised the estates, after the payment of her own debts, and *after her father's affairs should have been settled*, to B., and died intestate as to her residuary personal estate. Held that, as against *her next of kin*, the incumbrance created on the estate, by her father, must be considered to have merged in it. [*Swabey v. Swabey*] - 106

MONEY PAID INTO COURT.

At a testator's death, J. N. owed him 4,000 *l.*, but claimed to be entitled to it, as bequeathed to him by the will. By an order on motion, he was ordered to pay the 4,000 *l.* into Court to an account intitled "The Disputed Legacy Account of J. N.," and that sum was to be invested in stock, and the dividends were to be accumulated. At the hearing, the Court decided in favour of his claim. Held, nevertheless, that he was entitled, not to 4,000 *l.* sterling, but only to the stock and the accumu-

lations, although, owing to a fall in the funds, they, together, were of less value than 4,000 *l.* [*Hyde v. Neate*] - - - - - 558

MORTGAGE.

See MERGER.

MORTGAGOR AND MORTGAGEE.

1. In a suit to redeem, against a mortgagee in possession, the Court will not direct the Master to fix and charge the defendant with an occupation-rent, unless the plaintiff alleges and shews, not only that the defendant has been in possession of the mortgaged estate and in receipt of the rents and profits of it, but also that he has been in the actual occupation of it or of part of it—*Semble*. [*Trulock v. Robey*] 265
2. In a suit to redeem against the devisee of the mortgage, an *account* of the rents received by the devisor, may be obtained, without his being represented on the record. [*Trulock v. Robey*] - - - 277
3. A. made a mortgage to B., and delivered to him the title-deeds of the estate. Some years afterwards, A. gave B. notice of his intention to pay off the mortgage at the end of six months; but did not pay the money until after that time, owing to B. not having offered him any indemnity that was satisfactory to him, in respect of B. having lost some of the deeds. B. then brought an ejectment for the estate; whereupon A. filed a bill to redeem. The Court decreed a redemption, and ordered that a sum which A. had paid for interest accrued on the mortgage-money after the expiration of the six months, should be re-paid to him; that B. should give him an indemnity to be ap-

proved of by the Master, and also pay the costs of the ejectment and of the suit. [*Lord Middleton v. Eliot*] - - - - - 531

See DEVISEE AND NEXT OF KIN.

MORTMAIN.

Testator bequeathed the residue of his personal estate to his executors, in trust for the establishment or institution of a charitable receptacle, if the same could be done, for fifty-four poor old men; but if no such institution could be conveniently established, he desired that the residue should be disposed of in charitable donations of 6 l. each, to persons of the same description. Held that the bequest was wholly void under the Statute of Mortmain. [*Attorney-General v. Hodgson*] - - - - - 146

MOTION.

Defendant moved, on affidavits, to dissolve an *ex-parte* injunction. The motion stood over at the plaintiff's request. The defendant then filed his answer, after which the plaintiff filed several affidavits. On the motion being resumed, those affidavits were held to be inadmissible. [*Woodin v. Field*] - 307

MUNICIPAL CORPORATION.

Under the Municipal Corporation Reform Act, the corporation of a city ought to be styled: The Mayor, Aldermen, and Citizens of the City. [*Corporation of Rochester v. Lee*] - - - - - 376

NEW ORDERS.

1. A party beneficially interested in a testator's estate, employed counsel to attend for him before the

Master, on a question as to the propriety of allowing certain items in the executor's discharge. Held, notwithstanding the question was one of considerable difficulty, that the expenses of employing counsel ought not to be allowed in taxing costs as between party and party. [*Russell v. Nicholls*] - - 151

2. If a cause was at issue before the Orders of May 1845 came into operation, publication in it does not pass either under the 111th Order, or by giving rules according to the old practice, but a special order must be made for the purpose. [*Thomas v. Lewis*] - - - - - 296

3. After an infant defendant had appeared, the plaintiff moved, under the 32nd Order of May 1845, that J. S., a solicitor, might be appointed the infant's guardian, to answer the bill and defend the suit. Held that, as the infant had appeared, the Court might grant the motion on an affidavit stating, merely, that notice of the motion had been served on the *solicitor* who had entered the appearance, after the expiration of the time allowed for answering, and more than six days before the hearing of the motion. [*Cookson v. Lee*] - 302

4. All the trustees named in a will having died, a bill was filed by one of the *cestuis que trust* against the others, the heir of the trustee who died last, and certain persons who had been in possession of the estates, praying for an account of the rents received by those persons, for the appointment of new trustees, and that the estates might be conveyed to them by the heir of the trustee who died last. Held that the *cestuis que trust* who were defendants, had been rightly served with a copy of the bill under the

- 23rd General Order of August 1841. [*Johnson v. Tucker*] 485
5. If a bill is wholly demurrable, the defendant, if he answers it, must answer fully. [*Gattland v. Tanner*] - - - - - 567
6. At the hearing of an objection, taken by an answer for want of parties, the defendant is not at liberty to contend that there is any defect of parties in addition to that stated in the answer. [*Lovell v. Andrew*] - - - - - 581
7. Replication ordered to be taken off the file, because notice of the filing of it was not given on the day on which it was filed. [*Johnson v. Tucker*] - - - - - 600
- See AMENDMENT, 2.—DEBTOR AND CREDITOR, 2.—OBJECTION FOR WANT OF PARTIES.—PRACTICE.—SERVICE OF COPY BILL.

NEXT OF KIN.

See CONSTRUCTION, 6, 13.—DEVISEE AND NEXT OF KIN.

NOTICE.

A railway company being empowered by their act to take, amongst other lands, a close belonging to the plaintiff, gave him notice of their intention to take a certain part of it; and, more than a year afterwards, they gave him notice of their intention to take the remainder. The part first taken, was intended for making the railway, and the remainder, for making a station, both of which their act empowered them to make. Held that the power of the company with respect to the plaintiff's close, was not exhausted by their first notice. [*Simpson v. The Lancaster and Carlisle Railway Company*] - - - - - 580

See CHOSE IN ACTION.—COVENANT.—CREDITOR.—INJUNCTION.

—MORTGAGOR AND MORTGAGEE, 3.—ORDER AND DISPOSITION.—RAILWAY COMPANY.

OBJECTION FOR WANT OF PARTIES.

1. At the hearing of an objection, taken by an answer, for want of parties, the defendant is not at liberty to contend that there is any defect of parties in addition to that stated in the answer. [*Lovell v. Andrew*] - - - - - 581
2. Although the Court allows an objection for want of parties, at the hearing under the 39th Order of August 1841, it will not order the costs of the proceeding to be paid to the defendant, but will reserve them until the hearing of the cause. [*Ibid.*]

See IMPERTINENCE.

OCCUPATION RENT.

In a suit to redeem, against a mortgagee in possession, the Court will not direct the Master to fix and charge the defendant with an occupation-rent, unless the plaintiff alleges and shews, not only that the defendant has been in possession of the mortgaged estate and in receipt of the rents and profits of it, but also that he has been in the actual occupation of it or of part of it—*Semble*. [*Trulock v. Robey*] 265

“OR” CONSTRUED “AND.”

Testator gave all his property to his mother for life, and directed that, at her decease, it should be divided amongst his three sisters *or their children*, in such proportions as she should appoint. The mother and one of the sisters died in the testator's lifetime. The deceased sister left no issue; but one of those that survived had children. Held

that "or" must be read "and;" and that, under the circumstances of the case, the property must be considered as given to the three sisters and their children in equal shares. [*Penny v. Turner*] 368
See WILL, 8.

ORDER AND DISPOSITION.

A trustee for sale of a testator's estates, sold part of them and paid the proceeds into court. A party entitled to a share of the testator's property, assigned his interest to S. by way of mortgage; and S. gave notice of the assignment to the trustee, but did not obtain a stop order. The remainder of the estates was afterwards sold and the proceeds paid into court under the decree in the suit. Subsequently, the assignor took the benefit of the Insolvent Debtors' Act. Held, that the notice given to the trustee was sufficient to take the assigned share out of the order and disposition of the assignor. [*Matthews v. Gabb*] - - - - - 51

ORDER TO AMEND.

An objection for want of parties having been allowed at the hearing, the plaintiffs obtained an order for leave to amend by adding parties. They did not, however, amend, but again brought on the cause for hearing, without having discharged the order, or stated on the record why they had not acted upon it. The Court refused to proceed with the hearing. [*Davis v. Chanter*] 93

ORIGINAL AND SUPPLEMENTAL SUIT.

After an order on further directions had been made, which contained a declaration as to the rights of the

plaintiff, he discovered that A. ought to have been made a party to the suit, and filed a supplemental bill to bring him before the Court. On the hearing of the supplemental suit, A. objected that the declaration was erroneous in law; but the Court said that the same declaration must be made in the supplemental as had been made in the original suit; for otherwise the record would be inconsistent with itself; and that A. must present a petition of re-hearing. [*Jenkins v. Cross*] - - - - - 76

See PLEADING, 1.

PARENT AND CHILD.

See VOLUNTARY TRANSFER OF STOCK.

PARISHIONER.

See WITNESS.

PARTIES.

1. Bill against a husband and his wife for the specific performance of an agreement, made by the husband, for the sale of an estate to the plaintiff. The bill alleged, as the grounds for making the wife a co-defendant, that she claimed an interest in the purchase-money, and had taken forcible possession of the title-deeds, and refused to part with them, unless her claim was satisfied. The Court held that she was improperly made a defendant, and allowed a demurrer by her, for want of equity. [*Muston v. Bradshaw*] 192
2. In a suit to redeem against a devisee of the mortgage, an account of the rents received by the deviser, may be obtained without his being represented on the record. [*Trulock v. Robey*] - - - - - 277
3. A joint-stock company was formed

for making a railway; but, some time afterwards, the project was abandoned. One of the shareholders then filed a bill, *on behalf of himself and all the other shareholders*, except the members of the managing committee, who were made defendants, praying for an account of the monies received, and the expenses properly incurred, by the defendants, on account of the company; that the plaintiff, *and the other shareholders, might be declared liable to contribute* to such expenses in proportion to the number of their shares, or in such other proportion as the Court should think just; and that such proportion might be deducted out of the deposits on their shares, and the residue be repaid to them; and *that the surplus of the monies in the hands of the defendants*, after discharging the debts and liabilities of the company, *might be applied in aid of the objects of the suit, as the Court should direct*. A demurrer to the bill, for want of equity and want of parties, was overruled. [*Cooper v. Webb*] - - - 454

4. After a railway project had been abandoned, and the directors had returned some of the shareholders 1*l.* 8*s.* per share, on their deposits, one of the shareholders who had received that sum, filed a bill on behalf of himself and all the other shareholders except the defendants, (who were the directors), praying for an account of the receipts and payments of the defendants as directors; that the balance which should be found due from them, might be paid into court, and applied, first, in paying 1*l.* 8*s.* per share, to the shareholders who had not received that sum; and that the residue might be divided amongst

all the shareholders in proportion to their shares. Two of the defendants stated, in their answer, that the shareholders who received the 1*l.* 8*s.* per share, received it in full satisfaction of their claims on the funds of the company. Held that the bill ought to have been filed on behalf of the shareholders who had received the payment, and that the other shareholders ought to have been made defendants. [*Lovell v. Andrew*] - - - 581

See LIMITED ADMINISTRATOR. —
OBJECTION FOR WANT OF PARTIES.

PARTITION.

1. Commissioners of partition have no power to award sums to be paid for owelty of partition. [*Mole v. Mansfield*] - - - - - 41
2. In a suit for partition, if a reference is necessary to ascertain the interests of the parties, the direction for the commission ought to be postponed until the hearing for further directions. [*Cole v. Sewell*] 284

PARTNERSHIP.

By articles of partnership between A. and B. the partnership was to be dissolved on either party giving the other six months' notice. A. gave the required notice. Held that it was effectual, notwithstanding B. was insane when it was given. [*Robertson v. Lockie*] - - - 285
See PARTIES, 3, 4.

PATENT.

The doctrine laid down by the Court of Exchequer, that, if a patent has been infringed unintentionally, the patentee is not entitled to redress, disapproved of. [*Heath v. Unwin*] 552

PERPETUITY.

Testator devised his estates to trustees, in trust for his brother's first and other sons, successively, in fee; but so that the estate and interest of each of them should cease, in favour of his next brother, on his dying under twenty-one, and without leaving issue living at his death; and if all of them should die under that age, and without leaving issue living at their deaths, in trust for the person who should then be his heir, absolutely. And he empowered the trustees of his will for the time being, to sell the estates *at any time after his decease and at their sole discretion*. Held that the power of sale was valid. [*Nelson v. Callow*] 353

PERSONAL ESTATE.

See WILL, 3.

PERSONAL REPRESENTATIVE.

See LIMITED ADMINISTRATOR.—PRACTICE, 5.—REPRESENTATION.

PETITION.

1. Facts occurred after a petition has been answered, cannot be introduced into it by amendment. [*Doubtfire v. Elworthy*] - - - 77
2. A testator died seised of a moiety of a plantation in Jamaica. A. and B., the owners of the other moiety, granted a lease of it to the trustee and executor of the testator's will. He died before the lease expired. After his death, certain persons resident in Jamaica, were appointed receivers and managers of the testator's estates, in a suit in this country, for the execution of the trusts of the will; and a mer-

chant in London was appointed consignee and receiver of the produce of the estates. The managers and receivers took possession of the entirety of the plantation, and shipped the produce to the consignee, but did not pay A. and B. any rent. A. and B., though not parties to the suit, petitioned, in it, to be paid the arrears of rent due to them out of the funds in the cause, which had arisen from the balances paid in by the consignee. The Court directed a preliminary inquiry, with a view to granting the prayer of the petition. [*Neate v. Pink*] - - - - - 450

PLAINTIFF.

A plaintiff, whose residence was correctly stated in the bill, ordered to give security for costs, because he had frequently changed his place of abode since the bill was filed. [*Player v. Anderson*] - - 104

PLEADING.

1. A. filed an original bill and afterwards another bill, which he prayed might be taken as supplemental to the former, against B. Some of the statements in the latter were not only inconsistent with, but contradictory to some of the statements in the former. Both bills were dismissed with costs. [*Blackburn v. Staniland*] - - - - 64
2. The plaintiff claimed an estate which was in the defendant's possession, and prayed for an account and payment of the rents received by the defendant, and for a discovery of all the documents in the defendant's possession relating to the matters contained in the bill. The defendant pleaded the instrument under which he claimed, to

- all the relief and to so much of the discovery as related to the rents, and answered to the matters which his plea did not purport to cover, and set forth a list of all the documents in his possession relating to the matters in the bill, except such of them as related to the rents. Held that the plaintiff was entitled to a discovery of those documents also. [*Rigby v. Rigby*] - - 90
3. If the will of a testator is stated to have been proved by A. his executor, in the Prerogative Court, and the will of A. to have been proved by B., his executor, in the proper Ecclesiastical Court, *non constat* that B. is the personal representative of the original testator. [*Jossaume v. Abbot*] - - 127
4. After decree in a suit against the heir of A., the plaintiff petitioned for leave to file a bill of review, alleging error apparent on the face of the decree, and also that the plaintiff had discovered, since the decree, that the defendant was the executor of A., and that it was essential to the establishment of the plaintiff's rights, to bring the defendant before the court, in his executorial character. Petition dismissed, because a bill of review for error apparent, may be filed without the leave of the Court; and because the defendant had admitted, in his answer, that A.'s will was in his possession. [*Trulock v. Robey*] 265
5. A joint-stock company was formed for making a railway; but, some time afterwards, the project was abandoned. One of the shareholders then filed a bill, *on behalf of himself and all the other shareholders*, except the members of the managing committee, who were made defendants, praying for an account of the monies received, and the expenses properly incurred, by the defendants, on account of the company; that the plaintiff, *and the other shareholders, might be declared liable to contribute* to such expenses in proportion to the number of their shares, or in such other proportion as the Court should think just; and that such proportion might be deducted out of the deposits on their shares, and the residue be repaid to them; and *that the surplus of the monies in the hands of the defendants, after discharging the debts and liabilities of the company, might be applied in aid of the objects of the suit, as the Court should direct.* A demurrer to the bill, for want of equity and want of parties, was overruled. [*Cooper v. Webb*] 454
6. After a railway project had been abandoned, and the directors had returned some of the shareholders 1*l.* 8*s.* per share, on their deposits, one of the shareholders who had received that sum, filed a bill on behalf of himself and all the other shareholders except the defendants (who were the directors), praying for an account of the receipts and payments of the defendants as directors; that the balance which should be found due from them, might be paid into court and applied, first, in paying 1*l.* 8*s.* per share to the shareholders who had not received that sum; and that the residue might be divided amongst all the shareholders in proportion to their shares. Two of the defendants stated, in their answer, that the shareholders who received the 1*l.* 8*s.* per share, received it in full satisfaction of their claims on the funds of the company. Held that the bill ought to have been filed on behalf of the shareholders

who had received the payment, and that the other shareholders ought to have been made defendants. [*Lovell v. Andrew*] - - - 581

See DECREE.—HUSBAND AND WIFE.
—OCCUPATION-RENT. — PARTIES.

PORCTIONS.

Testator devised his estates in B. to the same uses as the estates comprised in his eldest son's marriage settlement were thereby limited to: and he devised his estates in M. to trustees, in trust, by sale or mortgage, to raise portions of 5,000 *l.* each for his younger children; and *from and after the performance of that trust*, and subject thereto *in the first instance*, and subject to the payment of such of his debts as his personal estate should be insufficient to satisfy, he devised those estates to his eldest son in fee, and appointed him his executor. The testator died indebted by specialty as well as simple contract: and, his personal estate being insufficient to pay his debts, his eldest son, with the concurrence of the trustees of the estates in M., sold those estates, and exhausted the proceeds in making good the deficiency of the personal estate to pay the testator's debts. Held that his younger children were entitled, in respect of their portions, to a charge on the estate in B., equal in amount to the proceeds of the estates in M. which had been applied to pay the specialty debts. [*Legh v. Legh*] 135

POWER.

1. A will, in order to be a good exercise of a power, was required to

be signed and *published* by the donee, in the presence of and *attested* by two or more credible witnesses. The donee made a will, which was signed by him and was attested thus: "We, the undersigned, attest to have seen the above testator sign the above will." Held that that clause was, in effect, an attestation to the publication as well as the signature of the will, and, consequently, that the power was well exercised. [*Bartholomew v. Harris*] 78

2. A testatrix having personal property of her own and a power, under her father's will, to appoint a fund, by deed or will, amongst her brothers and sisters, after directing her debts and funeral and testamentary expenses to be paid out of her personal estate, and giving pecuniary legacies to persons not objects of the power, and a portion of the fund over which she had the power, to persons who were objects of it, bequeathed the residue of *her personal estate after payment of her debts, funeral and testamentary expenses and the before-mentioned legacies*, to two persons who also were objects of the power. Held that the residuary clause was a valid appointment of the remainder of the fund over which she had the power. [*Elliott v. Elliott*] 321

See POWER OF SALE.

POWER TO TAKE LANDS.

Before the expiration of the time allowed to a railway company, to take lands compulsorily, the company gave the plaintiff notice of their intention to take his lands and summoned a jury to assess the value of them: but the time expired before the jury gave their verdict. The

Vice-Chancellor held that the company were not entitled to take possession of the lands, and restrained them from so doing. But the Lord Chancellor, on a motion being made to discharge the order, did not agree with His Honor, and directed the opinion of a court of law to be taken on the point. [*Brocklebank v. The Whitehaven Junction Railway Company*] - - - 632

See RAILWAY COMPANY, 1.

POWER TO APPOINT NEW TRUSTEES.

A testator empowered his wife (who was a *cestui que trust* under his will), during her life, and, after her death, the then surviving or continuing trustee of his will, to appoint any new trustee or trustees, as often as any of his first or future trustees should die, &c. One of the trustees named in the will died before the testator. Held that the power did not authorise the widow to appoint a new trustee in the place of the deceased. [*Winter v. Rudge*]

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POWER OF SALE.

Testator devised his estates to trustees, in trust for his brother's first and other sons, successively, in fee; but so that the estate and interest of each of them should cease, in favour of his next brother, on his dying under twenty-one and without leaving issue living at his death; and if all of them should die under that age and without leaving issue living at their deaths, in trust for the person who should then be his heir, absolutely. And he empowered the trustees of his will for the time being to sell the estates *at any time*

after his decease and at their sole discretion. Held that the power of sale was valid. [*Nelson v. Callow*]

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See CONSTRUCTION, 9.

PRACTICE.

1. Where the time for serving a defendant with a copy of the bill has been enlarged, it is not necessary to serve the defendant with the order enlarging the time. [*Fenton v. Clayton*] - - - 82
2. An infant defendant, on attaining twenty-one, discharged the solicitor who had acted for her in the suit. Afterwards, that solicitor was served with a subpoena, for her to hear judgment. He returned the subpoena to the plaintiff's solicitor, and stated at the same time, that the defendant had come of age, and that he was no longer employed for her. Some months afterwards the cause was heard, but without the defendant having been served with a subpoena to hear judgment, or any one appearing for her at the hearing; and a decree was made in which she was described as an infant. Held that she was entitled to put in a new answer to the bill. [*Snow v. Hole*]
161
3. If an heir files a bill stating that his ancestor's will was duly executed and attested, but dies before the cause is heard, leaving an infant heir, the will must be proved. [*Hollings v. Kirkby*] - - 183
4. If a cause was at issue before the Orders of May 1845 came into operation, publication in it does not pass either under the 111th Order, or by giving rules according to the old practice: but a special order must be made for the purpose. [*Thomas v. Lewis*] - - - 296

5. Stock in court ordered to be transferred to a person claiming it under letters of administration granted not by the Prerogative Court of Canterbury, but by the Consistory Court of London. [*Druce v. Denison*] - - - - - 356
 6. The affidavit required by the 67th Order of May 1845, on a special application to amend an information, must be made by the solicitor to the relators. [*Attorney-General v. Wakeman*] - - - - - 358
 7. All the trustees named in a will having died, a bill was filed by one of the *cestuis que trust* against the others, the heir of the trustee who died last, and certain persons who had been in possession of the estates, praying for an account of the rents received by those persons, for the appointment of new trustees, and that the estates might be conveyed to them by the heir of the trustee who died last. Held that the *cestuis que trust* who were defendants had been rightly served with a copy of the bill under the 23rd General Order of August 1841. [*Johnson v. Tucker*] 485
 8. On a reference to the Master under a decree, all the evidence referred to in the decree, is before the Master. Therefore, a party who objects to the draft of the Master's report, on the ground that it is not warranted by the evidence, is not bound to produce *office copies* of the depositions; but he ought, previously, to notify to the Master what parts of the evidence he intends to rely upon. [*Wilson v. Wilson*] 487
 9. After a plaintiff has set down a cause to be heard on an objection for want of parties raised by the answer, he cannot refer the answer for impertinence. [*Lovell v. Andrew*] - - - - - 586
 10. Replication ordered to be taken off the file, because notice of the filing of it was not given on the day on which it was filed. [*Johnson v. Tucker*] - - - - - 600
 11. A husband having obtained leave to answer separately from his wife, an order was made, on the plaintiff's application, for the wife to answer separately from her husband. [*Bray v. Akers*] - - - - - 610
- See AFFIDAVIT. — DISCOVERY. — JURISDICTION. — NEW ORDERS. — PLAINTIFF. — RECEIVER. — TRUST FUNDS, 2.

PRECATORY TRUST.

Testator gave to his wife, all her jewels, trinkets, &c., which he added might be finally appropriated as she pleased, with the sum of 4,000*l.* in money; but which sum *he recommended her* to divide amongst certain persons in certain shares. Held, by the Vice-Chancellor, that a trust was created in favour of those persons, to take effect after the wife's death. The Lord Chancellor, however, held the contrary, on appeal. [*White v. Briggs*] 33

PRIVILEGED COMMUNICATIONS.

A solicitor who was examined as a witness in a suit to rectify a mistake in a marriage settlement, declined to produce certain letters, on the ground that he had received them in his character of confidential solicitor to the intended wife; and he declined to produce certain books, because they contained particulars of confidential matters between him and his clients. Held that the grounds alleged for the non-production were insufficient. [*Walsh v. Trevanion*] - - 577

PROBATE DUTY.

A. made a mortgage in fee to secure a sum lent to him by the trustees of his marriage settlement. On his death, his daughter became entitled to the equity of redemption of the mortgaged estate, as his heir, and, under his marriage settlement, to the mortgage-money. The trustees then conveyed the estate to her subject expressly to the equity of redemption, and did not release her father's covenant for re-payment of the money. Afterwards she granted an annuity to M., and as a security for it, conveyed the estate and assigned the money to a trustee for him. By her will she devised the estate, but did not dispose of her personal estate. Held that the money was subject to probate and legacy duty. [*Swabey v. Swabey*] - - - - - 502

PROCEEDINGS BEFORE THE MASTER.

See PRACTICE, 8.

PRODUCTION OF DOCUMENTS.

Lord P., having conveyed his estates to trustees in trust to raise money for payment of his debts, and, subject thereto, in trust for himself, a suit was instituted, by one of his creditors, against him and his other creditors, to have the trusts of the deed carried into execution. After the defendants had answered the bill, and the deeds relating to the estates had been deposited in the Master's office, Lord P. died having devised the estates to his nephew; who, after he had been made a defendant to a supplemental bill, entered into a treaty, with an insurance company, for a loan to en-

able him to pay off the debts due to the plaintiff and the other parties to the suit; and, after giving them notice of his intention to pay them off, he moved that all further proceedings in the suit might be stayed, and that he and his solicitors, and the solicitors and agents of the insurance company, might be at liberty to examine the abstracts of title to the estates, with the deeds in the Master's office, and to take copies thereof, for the purpose of verifying the title to the estates and effecting the loan; and that, for the same purpose, the plaintiff and two of the defendants might be ordered to produce, to him, and his solicitors, and to the solicitors and agents of the insurance company, all deeds, &c. in their custody relating to the estates.—Motion refused. [*Damer v. Earl of Portarlington*] - - - - - 380

See DISCOVERY, 2.

PROPERTY TAX.

A testator gave to his wife an annuity or clear yearly rent-charge of 1,800*l.*, clear of all taxes and deductions. Held that the annuity was subject to property tax. [*Wall v. Wall*] - - - - - 513

PUBLIC POLICY.

A. covenanted with B., a single woman by whom he had two children, to pay her, for her life, subject to the proviso thereafter contained, an annuity of 40*l.*: provided that if she should, at any time thereafter, happen to marry with any person, then the annuity should be reduced to 20*l.* Held that the proviso was void as being in restraint of marriage. [*Grace v. Webb*] 384
See SOLICITOR AND CLIENT, 2.

PUBLICATION.

See POWER, 1.—PRACTICE, 4.

RAILWAY COMPANY.

1. A railway company being empowered by their act to take, amongst other lands, a close belonging to the plaintiff, gave him notice of their intention to take a certain part of it; and, more than a year afterwards, they gave him notice of their intention to take the remainder. The part first taken was intended for making the railway, and the remainder, for making a station, both of which their act empowered them to make. Held that the power of the company with respect to the plaintiff's close, was not exhausted by their first notice. [*Simpson v. The Lancaster and Carlisle Railway Company*] - - - 560
2. Before the expiration of the time allowed to a railway company, to take lands compulsorily, the company gave the plaintiff notice of their intention to take his lands, and summoned a jury to assess the value of them: but the time expired before the jury gave their verdict. The Vice-Chancellor held that the company were not entitled to take possession of the lands, and restrained them from so doing. But the Lord Chancellor, on a motion being made to discharge the order, did not agree with His Honor, and directed the opinion of a court of law to be taken on the point. [*Brocklebank v. The Whitehaven Junction Railway Company*] 632

See JOINT-STOCK COMPANY.—PARTIES, 3, 4.

RATE-PAYER.

See WITNESS.

REAL ESTATES.

The Court has jurisdiction to order the real estates of a deceased debtor to be sold for payment of his debts in a suit for the administration of his estate, though it be instituted not by a creditor, but by the heir and the next of kin, of the deceased. [*Price v. Price*] - - - 484

RECEIVER.

1. The Court will not allow a receiver's recognizance to be put in suit, on a report shewing merely that *something* is due from the receiver. The *precise amount* of what is due, must be stated. The Court has no jurisdiction to order the personal representative of a receiver to account for the receiver's receipts, without a bill being filed. [*Ludgater v. Channell*] - - 479
 2. The pendency of a suit, in the Ecclesiastical Court, to have a probate or letters of administration recalled, is not, of itself, a sufficient ground to induce the Court to grant an injunction and receiver against the personal representative. [*Connor v. Connor*] - - - 599
- See JURISDICTION, 3, 4.

REDEMPTION.

See MORTGAGOR AND MORTGAGEE, 1, 2, 3.—OCCUPATION-RENT.—PARTIES.

REFERENCE OF TITLE.

Motion by a vendor for a reference as to title refused, because he had been guilty of laches in prosecuting the suit. [*Dorin v. Harvey*, 49

REHEARING.

See ORIGINAL AND SUPPLEMENTAL SUIT.

REMOTENESS.

See POWER OF SALE.

RENTS.

See APPORTIONMENT.

REPLICATION.

See PRACTICE, 10.

REPORT.

See DECREE, 2.

REPRESENTATION.

If the will of a testator is stated to have been proved by A., his executor, in the Prerogative Court, and the will of A. to have been proved by B., his executor, in the proper Ecclesiastical Court, *non constat* that B. is the personal representative of the original testator. [*Jossaume v. Abbot*] - 127

See PRACTICE, 5.

REPUGNANCY.

See ARTICLES OF SEPARATION.

RESIDUARY LEGATEE.

1. Testator gave all his real and personal estate to his brother James and his nephew, Malcolm, their heirs, executors, &c., in trust, by or out of his personal estate, or by sale, mortgage or other disposition of his real estate or any part thereof, to pay his sister 1,500 *l.*: and, after giving 1,000 *l.* to his brother James, he left to his brother, Donald, 2,000 *l.*, and added: "*and also to be my residuary legatee.*" After which, he gave 200 *l.* to another of his sisters. Held that Donald was the testator's residuary devisee as well as legatee. [*Evans v. Crosbie*] - - - - 601
2. In a suit by a residuary legatee against the executor of the will, the testator's estate proved insufficient to pay his debts. Held that the plaintiff was entitled to his costs, not as between solicitor and

client, but as between party and party only. The decision to the contrary in *Burkitt v. Ransom*, 2 Coll. 536, disapproved of. [*Weston v. Clowes*] - - - - 610

RESIDUE.

A testator bequeathed all his property to A., upon certain trusts, (but which were not co-extensive with his interest in the property), and, by a clause at the end of his will, appointed A. executor of it. Held that A. was not a trustee of the interest undisposed of for the testator's next of kin; but was entitled to it beneficially. [*Mapp v. Ellcock*] - - - - 568

See WILL, 11.

RESTRAINT OF MARRIAGE.

A. covenanted with B., a single woman, by whom he had two children, to pay her for her life, subject to the proviso thereafter contained, an annuity of 40*l.*: provided that if she should, at any time thereafter, happen to marry with any person, then the annuity should be reduced to 20*l.* Held that the proviso was void as being in restraint of marriage. [*Grace v. Webb*] 384

REVERSION.

See SETTLEMENT.

REVIVOR.

The general rule, that a suit cannot be revived for costs remains in force, notwithstanding the 1 & 2 Vict. c. 110, s. 18, gives the effect of judgments to decrees and orders of courts of equity. [*Andrews v. Lockwood*] - - - - 153, 295

SAVINGS.

By a marriage settlement, after reciting that the lady was entitled to

real and personal property, and that it had been agreed that she should settle it, and also all other property to which she might become entitled during the coverture, upon the trusts thereafter mentioned, all her then property was vested in trustees in trust, during her life, to pay and *apply* the income to such person or persons as she, from time to time, by any writing or writings signed by her, should appoint, and, in default of such appointment, to her for her separate use, and, after her death, to pay 500 *l.* a year to her husband for his life: and the settlement declared that, subject to those trusts, all the trust property and all the annual produce of it which might *remain unapplied* at her death should remain upon the trusts thereafter mentioned; none of which were for the benefit of her husband. The trustees received the income of the settled property and with the lady's privity and acquiescence paid it into a bank, in their own names, and made remittances to her from time to time as she required money. She and her husband separated soon after their marriage. She died in his lifetime. At her death 888 *l.* were in her house, and a balance of 2,049 *l.*, arisen from the income of the settled property received by the trustees, was standing to their credit in the books of the Bank. Held that the husband was entitled to the 888 *l.*; but that the 2,049 *l.* were subject to the ultimate trust of the settlement, as being annual produce *remaining unapplied* at the wife's death. [*Johnstone v. Lumb*]

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SCOTCH TRUSTEES.

A Scotchman, by a testamentary in-
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strument in the Scotch form, bequeathed all his personal estate to trustees, in trust to pay legacies and annuities, and the income of the surplus to A. for life, and, on A.'s death, to invest the capital in the purchase of lands in Scotland. The trustees named in the will, having disclaimed, the Court of Session appointed new trustees, who, as well as A., and several of the legatees and annuitants, were resident in Scotland. A. administered to the testator's estate in England: and filed a bill in Chancery, against the trustees, for the usual accounts of the testator's estate possessed by them, to have the residue ascertained and secured. The trustees filed a cross bill for an account of the testator's estate in England, possessed by A., and to have the residue ascertained and paid over to them upon the trusts of the will.—The Court refused to relinquish its jurisdiction over the fund in A.'s hands, and directed it to be paid into Court and to be invested in consols, and the dividends to be paid to A. for life. [*Preston v. Melville*] - - - - - 35

SECOND COUSINS.

Testator bequeathed a fund in trust for his second cousins. Held that a first cousin once removed was not entitled to a share. [*Corporation of Bridgnorth v. Collins*] 541

SECURITIES.

See MERGER.

SEIZURE QUOUSQUE.

The right of a lord of a manor to seize *quousque*, is not taken away by 11 Geo. 4 & 1 Will. 4, c. 65,
z z

[*Dimes v. Grand Junction Canal Company*] - - - - - 433

SEPARATE PROPERTY.

See ANTICIPATION. — HUSBAND AND WIFE.

SERVICE OF COPY BILL.

Where the time for serving a defendant with a copy of the bill has been enlarged, it is not necessary to serve the defendant with the order enlarging the time. [*Fenton v. Clayton*] - - - - - 82

See NEW ORDERS, 4.

SETTLEMENT.

A reversion of a moiety of a farm was settled, on a marriage, and the trustees were empowered to sell it *when in possession*; and the intended husband and wife covenanted that, if they should thereafter acquire any other share or interest in the farm, they would, immediately thereupon, convey the same so that it might become vested in the trustees upon the trusts, and subject to the powers declared of the settled moiety. After that moiety had fallen into possession, a moiety of the other moiety descended to the wife, not in possession but subject to a life interest. Held, nevertheless, that it, as well as the settled moiety, were saleable under the power. [*Giles v. Homes*] - 359

See FEME COVERTE. — HUSBAND AND WIFE. — VOLUNTARY SETTLEMENT.

SIMPLE CONTRACT DEBTS.

Specialty creditors having exhausted their debtor's personal estate, a decree was made for marshalling his assets. A considerable time elapsed

before the real estates could be made available for the purposes of the decree. Held that the simple contract creditors were not entitled to have the interest which would have accrued on the specialty debts if they had remained unsatisfied, as well as the amount of the personal estate, raised out of the real estates, and applied towards satisfaction of their debts. [*Cradock v. Piper*] 301

See STAT. 3 & 4 WILL. 4, c. 104.

SOLICITOR.

A solicitor who was examined as a witness in a suit to rectify a mistake in a marriage settlement, declined to produce certain letters, on the ground that he had received them in his character of confidential solicitor to the intended wife; and he declined to produce certain books, because they contained particulars of confidential matters between him and his clients. Held that the grounds alleged for the non-production were insufficient. [*Walsh v. Trevanion*] - - 577

SOLICITOR AND CLIENT.

1. A solicitor's lien for costs is not confined to deeds and papers, but extends to other articles delivered to him for the purpose of being exhibited to witnesses on the trial of an action. [*Friswell v. King*] 191
2. A lady resident in Ireland agreed with an Irish solicitor, that if he would employ a solicitor in London to take out for her certain letters of administration in England, which were necessary to complete her title to a fund in the Court of Chancery in England, and afterwards procure the fund for her, he should receive a commission of 10 per cent. upon

the amount of the fund, and also be reimbursed what he should pay to the London solicitor. Held that the agreement was contrary to policy, and therefore could not be enforced. [*Strange v. Brennan*] 346

3. Under the common order for taxing a solicitor's bill, the Master ought to take an account of sums received, by the solicitor, for his client, in the character of solicitor, and which are connected with the items of the bill. But the Master ought not to take, under that order, a general account between the parties; and, consequently the decision to the contrary, in *Russel v. Buchanan*, ante, Vol. IX., page 175, was erroneous. [*Cooper v. Ewart*] 564

SPECIAL RETAINER.

Held that in taxing the costs of a suit, which were to be paid by the defendant, a special retainer paid by the plaintiff to the Attorney-general, who did not usually practise in the Court of Chancery, ought to be allowed, although there were no special circumstances which rendered the employing of the Attorney-general necessary. [*Nichols v. Haslam*] - - - - - 49

STAT. 11 GEO. 2, c. 19.

See APPORTIONMENT.

STAT. 29 & 30 GEO. 3, c. 98.

See THELLUSSON ACT.

STAT. 11 GEO. 4 & 1 WILL. 4, c. 60, s. 10.

The survivor of four trustees of a sum of stock died intestate, and his sole next of kin refused to administer to him. Held that the case was not within the 10th section of

11 Geo. 4 & 1 Will. 4, c. 60, and, therefore, that the Court could not appoint a person to transfer the stock. [*Lunn's Charity, In re*] 464

STAT. 11 GEO. 4 & 1 WILL. 4, c. 65.

The right of a lord of a manor to seize *quousque*, is not taken away by 11 Geo. 4 & 1 Will. 4, c. 65.

[*Dimes v. Grand Junction Canal Company*] - - - - - 483

The Court has no jurisdiction under 11 Geo. 4 & 1 Will. 4, c. 65, s. 17, to lease an infant's estates, unless the infant is indefeasibly seised, either in fee or in tail, *in possession*. [*Legh, Ex parte*] - - - 445

STATUTE OF LIMITATIONS (3 & 4 WILL. 4, c. 27.)

1. The 40th section of the Statute of Limitations (3 & 4 Will. 4, c. 27) applies to a case in which a judgment is sought to be enforced against the personal estate, as well as to a case in which it is sought to be enforced against the land of the debtor. [*Watson v. Birch*] 523
2. A., a creditor of a person deceased, filed a bill on behalf of himself alone, against B., the personal representative of the debtor, and C., who had in his possession certain papers belonging to the debtor, on which he claimed a lien for a debt alleged to be due to him from the deceased. The bill prayed for the usual accounts of the deceased's estate, and that it might be applied in a due course of administration; that A. might have access to the papers; and that the amount of C.'s lien, *if any*, might be ascertained and paid. The decree in the cause directed an account to be taken of A.'s debt, and the amount

to be paid out of a fund in Court; and, if the fund should be more than sufficient for that purpose, that what should be found due to the other incumbrancers should be paid to them: but it did not direct any account to be taken of those incumbrances: and, accordingly, the Master took an account of A.'s debt only. After it had been paid, C. presented a petition in the suit, praying for an account of what was due to him, and for payment of it out of the remainder of the fund. The order made on that petition, directed the Master to inquire and state *who were the incumbrancers, other than A., referred to by the decree*. Held that neither the institution of the suit, nor any of the proceedings in it, prevented the Statute of Limitations from running against C.'s claim. [*Watson v. Birch*] - - - - 523

STAT. 3 & 4 WILL. 4, c. 104.

The Court has jurisdiction to order the real estates of a deceased debtor to be sold for payment of his debts in a suit for the administration of his estate, though it be instituted not by a creditor, but by the heir and the next of kin of the deceased. [*Price v. Price*] - - - - 484

STAT. 10 & 11 VICT. c. 96.

1. A lady, whose title to a sum of stock depended upon there having been no issue of her marriage with her late husband, presented a petition stating that fact, and praying that the stock (which had been transferred into Court under the 10 & 11 Vict. c. 96) might be transferred to her. The Court, notwithstanding the petition was supported by affidavits, refused to make

the order until the fact on which the petitioner's title depended had been found by the Master. [*Trustees of Wood's Settlement, In re*] 469

2. Testator gave 2,000 *l.* to trustees, in trust for such of his nephews and nieces as should be living at his wife's death, and the issue of such of them as should be then dead. Upon the wife's death, the trustees paid the 2,000 *l.* into Court, under 10 & 11 Vict. c. 96. Afterwards a petition was presented by certain persons claiming shares of the 2,000 *l.*, as the issue of a deceased nephew of the testator, and praying to have those shares paid to them. The Court, notwithstanding the petitioners submitted to bear the costs of the inquiries necessary to ascertain their title, considered that those costs ought to be borne by the testator's estate; and also that the petitioners might be entitled to interest on their shares; and, therefore, it directed the inquiries, but without prejudice to the petitioners' right to file a bill; and it reserved the consideration of costs, and ordered the trustees to be served with the order. [*Sharpe's Trustees, In re*] - - - - 470

STATUTORY CONVEYANCE.

See COPYHOLDS.

STAYING PROCEEDINGS IN A SUIT.

See PRODUCTION OF DOCUMENTS.

STERLING OR CURRENCY. :

Prior to the passing of the act for assimilating the currencies of England and Ireland, an English lady married an Irish gentleman. By their

settlement, which was executed at Bath, where the marriage was solemnized, it was recited that the gentleman had agreed to charge certain of his estates in Ireland with the payment of a rent-charge of 1,000*l.* a year to the lady for life, in case she should survive him: but the sum secured to her by the deed was expressed to be 1,000*l.* a year *sterling lawful money of Ireland*. Held, nevertheless, that she was entitled to 1,000*l.* a year sterling. [*Cope v. Cope*] - - - - 118

SUFFICIENCY.

See ANSWER.

SUPPLEMENTAL BILL.

A. filed an original bill and afterwards another bill, which he prayed might be taken as supplemental to the former, against B. Some of the statements in the latter were not only inconsistent with, but contradictory to some of the statements in the former. Both bills were dismissed with costs. [*Blackburn v. Staniland*] - - - - 64

See DECREE, 1.

SURNAME.

See CONSTRUCTION, 14.

SURVIVING.

A married woman having power to dispose of 1,500*l.*, by her will gave the interest of it to her husband for his life, and directed that, after his decease, the principal should be divided, equally, between the five daughters of her sister, B.: and, if any of them should die during her husband's lifetime leaving issue, that the respective issue of such deceased daughters should have

equally divided among them their mother's share; but in case any of them should die during her husband's lifetime without lawful issue, that the 1,500*l.* should be divided, share and share alike, among *the surviving said daughters*. Held that the word "surviving" had reference to the testatrix's husband, and, therefore, as all the daughters died in his lifetime and only one of them left issue, that four-fifths of the 1,500*l.* were undisposed of. [*Watson v. England*] - - - - 1

SURVIVOR OR SURVIVORS.

1. Testator bequeathed a fund in trust for Elizabeth D. for her life, and, after her decease, in trust for four of her children whom he named: "or the survivor or survivors of them, for their maintenance, until they severally attain the age of twenty-one years, when each of them will be entitled to claim a fair proportion of the principal." Only one of the children survived the mother. Held that that one was entitled to the whole fund, though two of the deceased children attained twenty-one. [*Dorville v. Wolff*] - 510
2. Testator bequeathed 50,000*l.* to trustees, in trust for his wife for life, and, after her death, he gave one-fifth of that sum to the same trustees, in trust to invest it, and pay the interest to his daughter for her life, and upon her demise to appropriate the interest for the use of any her child or children until they reached the age of twenty-one years, and then the principal to be paid to *the survivor or survivors of the children* of his said daughter, share and share alike. The testator also gave 2,000*l.* to the same trustees, in trust to invest it and to pay the

interest to his daughter for her life, and after her decease to appropriate the interest for the use of any of her child or children until they reached the age of twenty-one years, when the 2,000*l.* was to be paid to *the survivor or survivors of the said children* of his said daughter. The daughter had two children who attained twenty-one, but only one of them survived her. Held that that child became entitled, on her death, to the whole of the trust-funds in which she had a life-interest. [*Turing v. Turing*] - - - 139

TAXATION.

Under the common order for taxing a solicitor's bill, the Master ought to take an account of sums received by the solicitor for his client, in the character of solicitor, and which are connected with the items of the bill. But the Master ought not to take, under that order, a general account between the parties; and, consequently, the decision to the contrary, in *Russel v. Buchanan*, ante, Vol. IX., page 175, was erroneous. [*Cooper v. Ewart*] - - - 564
See COSTS, 2.

TENANT FOR LIFE.

See WASTE.

TENANT FOR LIFE OF RESIDUE.

Testator bequeathed all his personal estate to trustees, and directed them to convert it into money, and to pay the interest to certain persons for their lives, and then to invest the principal in the purchase of lands; *it being also understood that where his money or personal estate might be lying on undoubted real or personal security, such securities might*

be only renewed in the names of the trustees. The testator's personal estate consisted, in part, of long annuities. Held that the *cestuis que trust* for life of the personalty, were not entitled to receive the long annuities; but that they must be converted into consols. [*Preston v. Melville*] - - - 35

TENANT FOR LIFE AND REMAINDERMAN.

1. For several years prior to 1846, an assurance company declared half-yearly dividends of 2*l.* 10*s.* per cent. on their stock, but, in that year, they declared a half-yearly dividend of 12*l.* 10*s.* per cent. Held that a tenant for life of their stock was entitled to the whole amount of that dividend. [*Price v. Anderson*] - - - 473
2. Ornamental timber protected, though the mansion-house had been pulled down, and the bill did not complain of that act. [*Morris v. Morris*] - - - 505

TENANT IN TAIL AND REMAINDERMAN.

A., on his father's death, became tenant in tail of estates in possession, with remainder to his younger brother in tail. After the father's death, a suit was instituted, on behalf of A. and his younger brother (both of whom were infants), and a receiver of the rents of the estates was appointed. The younger brother was made a party to that suit, as being entitled to a younger child's portion out of the estates. A. died under twenty-one, and without issue. At his death, the estates were held, as they had been ever since his father's death, *by yearly tenants under parol demises.* Held

that A.'s administratrix was entitled to a proportionate part of the rents which were accruing due at his death. [*Kevill v. Davies*] 466

TENANT IN COMMON.

One of two tenants in common of a farm permitted the other to occupy and cultivate it, without demanding any rent or other remuneration from him; but, after his death, claimed compensation out of his estate. The Vice-Chancellor allowed the claim: but the Lord Chancellor on appeal doubted whether it could be maintained, and directed an action to be brought. [*Henderson v. Eason*] - - - - 303

THELLUSSON ACT.

Testator directed the income of certain portions of a trust-fund to be paid to A., B., C., &c., for their lives; and, on the death of the survivor of them, the fund to be sold and the proceeds thereof, and also the proceeds which should have accumulated in respect thereof, to be divided amongst other persons. Held that, though there were accumulations of the income of the fund, which had arisen after the expiration of twenty-one years from the testator's death, the case was not within the Thellusson Act (29 & 30 Geo. 3, c. 98). [*Corporation of Bridgnorth v. Collins*] 538

TIMBER, ORNAMENTAL.

See EQUITABLE WASTE.

TITLE.

Evidence as to the heirship of daughters. [*Hemming v. Spiers*] 550
See VENDOR AND PURCHASER.

TRANSFER OF STOCK.

1. The survivor of four trustees of a sum of stock died intestate, and his sole next of kin refused to administer to him. Held that the case was not within the 10th section of 11 Geo. 4 & 1 Will. 4, c. 60, and, therefore, that the Court could not appoint a person to transfer the stock. [*Lunn's Charity, In re*] - - - - 464
2. Stock in court ordered to be transferred to a person claiming it under letters of administration granted not by the Prerogative Court of Canterbury, but by the Consistory Court of London. [*Druce v. Denison*] - - - - 356

See VOLUNTARY TRANSFER OF STOCK.

TRUST.

1. Testator devised freeholds and leaseholds to four persons, *intending* them to hold the same in trust for an alien, and, shortly afterwards, informed three of them of his intent; and those three, at his request, wrote letters to him acknowledging the intended trust. After his death, a suit was instituted by two of the devisees against the other two, the alien, the testator's next of kin and the Attorney-General as representing the crown, to have the rights of the parties declared. The Court refused to make any declaration, except that the lands were not subject to any trust. [*Burney v. Macdonald*] - - - - 6
2. Testator gave to his wife all her jewels, trinkets, &c., which he added might be finally appropriated as she pleased, with the sum of 4,000*l.* in money; but which sum *he recommended her* to divide

amongst certain persons in certain shares. Held, by the Vice-Chancellor, that a trust was created in favour of those persons, to take effect after the wife's death. The Lord Chancellor, however, held the contrary, on appeal. [*White v. Briggs*] - - - - - 33

3. A. directed his agents to invest part of his balance in their hands, in the purchase of 4,000*l.* stock, in the names of himself and his wife, in trust for his infant son. The agents made the purchase in the joint names, but without any trust expressed, because, as they afterwards informed A., the Bank objected to trust accounts appearing on their books. A. allowed the stock to remain without any trust being declared, and received the dividends of it down to his decease. Held that neither his son nor his wife (who survived him) were entitled to the stock, but that it formed part of his assets. [*Smith v. Ward*] - - - - - 56

TRUST FUNDS.

1. A lady, whose title to a sum of stock depended upon there having been no issue of her marriage with her late husband, presented a petition stating that fact, and praying that the stock (which had been transferred into court under the 10 & 11 Vict. 96) might be transferred to her. The Court, notwithstanding the petition was supported by affidavits, refused to make the order until the fact on which the petitioner's title depended had been found by the Master. [*Trustees of Wood's Settlement, In re*] - 469
2. Testator gave 2,000*l.* to trustees, in trust for such of his nephews and nieces as should be living at his

wife's death, and the issue of such of them as should be then dead. Upon the wife's death, the trustees paid the 2,000*l.* into court, under 10 & 11 Vict. c. 96. Afterwards, a petition was presented by certain persons claiming shares of the 2,000*l.*, as the issue of a deceased nephew of the testator, and praying to have those shares paid to them. The Court, notwithstanding the petitioners submitted to bear the costs of the inquiries necessary to ascertain their title, considered that those costs ought to be borne by the testator's estate; and also that the petitioners might be entitled to interest on their shares; and, therefore, it directed the inquiries, but without prejudice to the petitioners' right to file a bill; and it reserved the consideration of costs, and ordered the trustees to be served with the order. [*Sharpe's Trustees, In re*]

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See SCOTCH TRUSTEES.

TRUSTEES.

A testator empowered his wife, (who was a *cestui que trust* under his will), during her life, and, after her death, the then surviving or continuing trustee of his will, to appoint any new trustee or trustees, as often as any of his first or future trustees should die, &c. One of the trustees named in the will *died before the testator*. Held that the power did not authorize the widow to appoint a new trustee in the place of the deceased. [*Winter v. Rudge*] - - - - - 597

See ALIEN. — GRAMMAR-SCHOOL.
— SCOTCH TRUSTEES. — TRUST FUNDS.

TURNPIKE BONDS.

See VOLUNTARY ASSIGNMENT.

UNCERTAINTY.

Testatrix gave to each of the in-brothers and in-sisters for the time being resident in the several hospitals of or in the vicinity of Canterbury, whose yearly income should not exceed 25 *l.*, an augmentation or yearly increase of 5 *l.* for ever. Held that the bequest was void for uncertainty, principally on the ground that the amount of the fund to be appropriated to answer the bequest was not specified by the testatrix, and could not be determined. [*Flint v. Warren*] 626

See CONSTRUCTION, 11.

UNDUE INFLUENCE.

A. and B. consented to postpone the payment of 5,000 *l.* due to them from C., in consideration of C. procuring and giving them the plaintiff's guarantee for that sum, and C., at the same time, informed A. and B. that the plaintiff was his niece, and was possessed of considerable property; that she had resided with him for some time; that he had been her guardian, and that she had been of age for about a year and a half. Afterwards another arrangement was made between A. and B. and C., in pursuance of which A. and B. delivered up the guarantee, and C. procured and gave them the plaintiff's cheque for 3,000 *l.*, and her promissory note for 1,200 *l.*, as securities for his paying them those sums. The Court granted, and, afterwards, continued an injunction, restraining A. and B. from prosecuting an action against the plaintiff,

to recover the 3,000 *l.*; and, notwithstanding they had obtained a verdict, it refused to order the money into court. [*Maitland v. Irving*] - - - - - 437

VENDOR AND PURCHASER.

1. Motion by a vendor for a reference as to title refused, because he had been guilty of laches in prosecuting the suit. [*Dorin v. Harvey*] 49
2. Evidence as to the heirship of daughters. [*Hemming v. Spiers*] 550

See REFERENCE OF TITLE.—
TITLE.

VESTING.

1. Testator gave the residue of his real and personal estate to trustees in trust for his three nephews, their heirs, &c., as tenants in common, with cross remainders and benefit of survivorship, in case any of them should die before their shares in the trust property should *become vested* in them; which he desired might not be *shared* until his youngest nephew should attain twenty-four; and he directed his trustees to maintain and educate them, out of the income of the property, during their minorities. The nephews were infants at the testator's death. Held, nevertheless, that they took vested interests under the will. [*Parkin v. Hodgkinson*] - 293
2. Testator directed the dividends of two sums of stock to be equally divided between all his nephews living at his decease, and, after the decease of any of them, the capital of his share to be sold and the proceeds to be divided amongst his children; and, in default of such issue, *then* to go and

be divided amongst the children of A., and, *in case all A.'s issue should be dead*, then to be divided amongst the children of B. A. had four children. Three of them died; and then one of the testator's nephews died without issue. Held that the three deceased children, as well as the surviving child of A., took vested and transmissible interests in the deceased nephews' share of the stock. [*Cohen v. Waley*] 318

See CONSTRUCTION, 4, 8.

VOLUNTARY SETTLEMENT.

A. made a voluntary assignment of turnpike bonds and shares in companies, to B., in trust for himself for life, and after his death, for his nephew. He delivered the bonds and shares to B., but did not observe the formalities required, by the Turnpike-road Act and the deeds by which the companies were formed, to make the assignment effectual. Held, on his death, that no interest, in either the bonds or the shares, passed by the assignment, and that B. ought to deliver them to his executors. [*Searle v. Law*] - - - - - 95

See VOLUNTARY TRANSFER OF STOCK.

VOLUNTARY TRANSFER OF STOCK.

A. directed his agents to invest part of his balance in their hands, in the purchase of 4,000 *l.* stock, in the names of himself and his wife, in trust for his infant son. The agents made the purchase in the joint names; but without any trust expressed, because, as they afterwards informed A., the Bank ob-

jected to trust accounts appearing on their books. A. allowed the stock to remain without any trust being declared, and received the dividends of it down to his decease. Held that neither his son nor his wife (who survived him) were entitled to the stock, but that it formed part of his assets. [*Smith v. Warde*] 56

WASTE.

A lady, tenant for life of an estate, subject to a condition not to commit waste, married; and, during the coverture, her husband cut and sold timber on the estate. Held, (in opposition to the doctrine in *Lord Ormonde v. Kynnersley*, 5 Madd. 369), that the condition was not in the nature of a trust, and, consequently, that neither the wife nor her estate, but the husband alone, was answerable for the waste. [*Kingham v. Lee*] - - - 396

See EQUITABLE WASTE.

WILL.

1. A married woman having power to dispose of 1,500 *l.* by her will, gave the interest of it to her husband for his life, and directed that, after his decease, the principal should be divided equally, between the five daughters of her sister, B.: and if any of them should die during her husband's lifetime leaving issue, that the respective issue of such deceased daughters should have equally divided among them their mother's share; but in case any of them should die, during her husband's lifetime, without lawful issue, that the 1,500 *l.* should be divided, share and share alike, among the surviving said daughters. Held

- that the word "surviving" had reference to the testatrix's husband, and, therefore, as all the daughters died in his lifetime, and only one of them left issue, that four-fifths of the 1,500*l.* were undisposed of. [*Watson v. England*] - - - 1
2. Testator gave all his property, both real and personal, to his wife for life: "and, after the death of my wife, my nephew is to be considered as heir to all my property: but I direct that whatever portion of my property may, hereafter, be possessed by him, shall be secured, by my executors, for the benefit of his family." Held, taking the whole of the will together, that the testator, by the word, 'family' meant the children, but not the wife of his nephew; and that the property ought to be settled on the nephew for life, and on his children after his death. [*White v. Briggs*] - - - 17
3. Testator bequeathed all his personal estate to A., subject to the payment of his *debts and funeral and testamentary expenses*, and after charging his real estates with the payment of certain *legacies and annuities*, he devised them to B. Held that he had not exempted his personal estate from the payment of the legacies and annuities. [*Davies v. Ashford*] - - - 42
4. Bequest to testator's daughter for life, and on her death, to the testator's son *and his children*. The son had no child at his father's death, but had children living at the death of the daughter. Held that his children were neither joint-tenants with him, nor entitled in remainder after his death, but that the fund belonged to him absolutely. [*Scott v. Scott*] - - - 47
5. Testator bequeathed his residuary estate to A., the executor and trustee of his will; with a gift over in case of the death of A., so that he might not be enabled to perform the duties thereby required of him. A. proved the will, but died before he had fully performed the trusts of it. Held that, by merely proving the will, he entitled himself to the residue absolutely. [*Hollingsworth v. Grasett*] - - - 52
6. A will, in order to be a good exercise of a power, was required to be signed and *published* by the donee, in the presence of and *attested* by two or more credible witnesses. The donee made a will, which was signed by him, and was attested thus: "We, the undersigned, attest to have seen the above testator sign the above will." Held that that clause was, in effect, an attestation to the publication as well as the signature of the will, and, consequently, that the power was well exercised. [*Bartholomew v. Harris*] - - 78
7. Bequest of 8,000*l.* to testatrix's daughter, a married lady, towards purchasing a country residence. Held to be an absolute bequest. [*Knox v. Lord Hotham*] - - 82
8. Testator gave in trust to his brother E. the remainder of his property, of whatsoever kind, to assist him to bring up, educate, and provide for the children of his late brother, J., whom he named: "When my youngest nephew attains his age of twenty-one years, it is my will that all my property be equally divided amongst my nephews or their lawful issue, share and share alike; the division, however, is not to take place, although my youngest nephew have attained the age of twenty-one years, until the decease of my wife, my sister J., and my brother E." Held that the interests of the nephews were

- not contingent on their living until the youngest of them should attain twenty-one, but vested on the testator's death; and that the word, *or*, was to be construed conjunctively; and, consequently, that the nephews took estates-tail in their shares of the testator's real property, and absolute interests in their shares of his personal property. [*Parkin v. Knight*] - - - - - 83
9. Testator devised his estates in B. to the same uses as the estates comprised in his eldest son's marriage settlement were thereby limited to: and he devised his estates in M. to trustees, in trust, by sale or mortgage, to raise portions of 5,000*l.* each for his youngest children; and *from and after the performance of that trust*, and subject thereto *in the first instance*, and subject to the payment of such of his debts as his personal estate should be insufficient to satisfy, he devised those estates to his eldest son in fee, and appointed him his executor. The testator died indebted by specialty as well as simple contract: and, his personal estate being insufficient to pay his debts, his eldest son, with the concurrence of the trustees of the estates in M., sold those estates, and exhausted the proceeds in making good the deficiency of the personal estate to pay the testator's debts. Held that his youngest children were entitled, in respect of their portions, to a charge on the estate in B., equal in amount to the proceeds of the estates in M. which had been applied to pay the specialty debts. [*Legh v. Legh*] 135
10. Testator devised all his estates in the funds of England, and all his manors, messuages, lands, &c., both freehold, leasehold, and copyhold, to A., B., and C., and their sons, in strict settlement, and ultimately to his own right heirs for ever, and empowered his trustees to invest the residue of his personal estate in the purchase of freehold lands in England, and to convey the same to such of the uses thereinbefore declared of his manors, messuages, lands, and premises, devised by his will, as should be then subsisting. A. and B. died, without issue, in the testator's lifetime. C., who was his heir-at-law and executor, was living, but had no issue male. The testator's next of kin filed a bill against C., praying, amongst other things, for a declaration that, in the event of C. dying without leaving issue male, the plaintiff would be entitled to the testator's personal estate. A general demurrer to the bill was allowed. [*De Beauvoir v. De Beauvoir*] 163
11. Testatrix bequeathed the residue of her estate, goods, chattels and effects, which she should be possessed of, interested or entitled to at her decease, to trustees, with very special directions to apply the *whole* of the income thereof, for the benefit of her daughter (who was a lunatic), for her life. Held, nevertheless, that the bequest of the residue was not specific, and consequently, that certain leasehold houses, which formed part of it, ought to be sold and the proceeds invested in the Three per Cents. [*Chambers v. Chambers*] - 183
12. Testator gave his residuary real and personal estate to trustees, in trust to pay the rents, interest and dividends thereof, to his wife for her life, and, *after her decease*, to sell, convert into money, collect and get in the same, *and to pay and divide* the monies to arise therefrom,

- unto and equally between and amongst such of the children of his sisters Martha, Phebe, Alice, &c., *as might be living at the time of the decease of his wife, and the issue of such of them as might be then dead, in equal shares and proportions*, such issue only to take the share which their respective parents would have taken if living; provided such children or issue should then have attained twenty-one, otherwise to pay to them the interest of their shares until they should attain that age, and then to pay them the principal. The testator's wife survived him. Each of his sisters had several children. A child of Martha died before the testator's wife, leaving children, and one of those children also died *before the testator's wife*: Held, nevertheless, that that one took a vested and transmissible interest in the testator's residuary estate. [*Lyon v. Coward*] - 287
13. Testator gave the residue of his real and personal estate to trustees in trust for his three nephews, their heirs, &c., as tenants in common, with cross remainders and benefit of survivorship, in case any of them should die before their shares in the trust property should *become vested* in them; which he desired might not be *shared* until his youngest nephew should attain twenty-four; and he directed his trustees to maintain and educate them, out of the income of the property, during their minorities. The nephews were infants at the testator's death. Held, nevertheless, that they took vested interests under the will. [*Parkin v. Hodginson*] - - - 293
14. Testator directed the dividends of two sums of stock to be equally divided between all his nephews living at his decease, and, after the decease of any of them, the capital of his share to be sold and the proceeds to be divided amongst his children; and, in default of such issue, *then* to go and be divided amongst the children of A., and, *in case all A.'s issue should be dead*, then to be divided amongst the children of B. A. had four children. Three of them died; and then one of the testator's nephews died without issue. Held that the three deceased children, as well as the surviving child of A., took vested and transmissible interests in the deceased nephew's share of the stock. [*Cohen v. Waley*] - - - 318
15. Testator gave all his property to his mother for life, and directed that, at her decease, it should be divided amongst his three sisters *or their children*, in such proportions as she should appoint. The mother and one of the sisters died in the testator's lifetime. The deceased sister left no issue; but one of those that survived, had children. Held that "or" must be read "and;" and that, under the circumstances of the case, the property must be considered as given to the three sisters and their children in equal shares. [*Penny v. Turner*] 368
16. Testator bequeathed all his property in the Austrian and Russian funds, and also that vested in a Swedish mortgage security. The testator, at the death of his will, had several sums invested on different Swedish mortgages. Held that the bequest was not void for uncertainty, but that all the sums invested on Swedish mortgages passed by it. [*Richards v. Patte-son*] - - - 501
17. Testator bequeathed a fund in trust for Elizabeth D. for her life, and, after her decease, in trust

- for four of her children, whom he named; "or the survivor or survivors of them, for their maintenance, until they severally attain the age of twenty-one years, when each of them will be entitled to claim a fair proportion of the principal." Only one of the children survived the mother. Held that that one was entitled to the whole fund, though two of the deceased children attained twenty-one. [*Dorville v. Wolff*] - - - 510
18. Testator bequeathed a fund in trust for his second cousins. Held that a first cousin once removed was not entitled to a share. [*Corporation of Bridgnorth v. Collins*] 541
19. Testator gave J. P. and I. P. 10*l.* each for mourning, and 100*l.* to J. T. N., his executor, for the trouble he would have in the execution of the will. By a codicil, he gave legacies to other persons, and directed that if they or any other person who had a legacy left them by any will, should owe him any sum or sums of money at his decease, it should be considered *as part of their legacy*. At the testator's death, J. T. N. owed the testator 4,000*l.*, and two of the other legatees also owed him sums much greater than their legacies. Held that the testator intended to remit their debts, as well as to give them their legacies. [*Hyde v. Neate*] 554
20. Testator bequeathed a fund in trust for his wife and daughter for their lives successively; with remainder in trust for the children of his daughter; and if at her death she should leave no child living, in trust to sell the fund and pay A. and B. 500*l.* each, if they should *be alive at that time*: and he bequeathed the remainder, *to and among his heirs-at-law, share and share alike*. The daughter was the testator's heir at his death. She died a spinster. Held that her personal representative was entitled to the fund as part of her assets. [*Ware v. Rowland*] - - - 588
21. Testator bequeathed a fund in trust for his next of kin of the surname of Crump who should be living at the decease of A. B. A lady whose maiden name was Crump, was the testator's sole next of kin at A. B.'s death; but she married after the testator's death, and then took and ever afterwards bore her husband's surname, which was Carpenter. Held, nevertheless, that she was entitled to the fund. [*Carpenter v. Bott*] - - - 606
22. Testator gave all his real and personal estate to his brother, James, and his nephew, Malcolm, their heirs, executors, &c., in trust, by or out of his personal estate, or by sale, mortgage or other disposition of his real estate or any part thereof, to pay his sister 1,500*l.*: and, after giving 1,000*l.* to his brother James, he left to his brother, Donald, 2,000*l.*, and added: "and also to be my residuary legatee." After which he gave 200*l.* to another of his sisters. Held that Donald was the testator's residuary devisee as well as legatee. [*Evans v. Crosbie*] - - - 601
23. Testator bequeathed certain houses in trust for his granddaughter Martha, for her separate use for her life, and on her decease, in trust to apply the rents for the maintenance of her children then living, and, when they should all attain twenty-one, in trust to sell the houses and divide the produce amongst them equally; and, in case Martha should die without

leaving issue, to divide the produce amongst such of the testator's grandchildren thereafter named, as should be living at her decease. And the testator, by three separate and subsequent clauses, bequeathed other houses in trust for his grand-daughters Charlotte, Sarah and Harriett, for their separate use for their lives, and repeated, after each clause, "and, after her decease, in trust for the issue of her body in the same manner and subject to the same conditions and limitations as hereinbefore expressed in the bequest to my grand-daughter Martha." In a subsequent part of his will, he declared that, if all his said grand-daughters should die without leaving issue, all the houses mentioned in his will, should fall into the residue of his estate. Charlotte died leaving issue. Harriett died without issue. Held that the houses bequeathed in trust for

her went over to Martha and Sarah, as being the only grandchildren of the testator living at her death. [*Doughty v. Saltwell*] - - 640

See GRAMMAR-SCHOOL. — HEIR. — ISSUE DEVISAVIT VEL NON. — UNCERTAINTY.

WITNESS.

A suit was instituted by A. and B., two of the guardians of the poor of a parish, on behalf of themselves and the other guardians, to enforce payment of money for the benefit of the parish. Held that S. was a competent witness for the plaintiff, notwithstanding he was one of the guardians when the suit was instituted, and was interested in the result of it as a parishioner, when he gave his evidence. [*Scott v. Pascall*] - - - - - 559

See SOLICITOR.

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